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NORTH CAROLINA REPORTS
VOL. 185

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF

NORTH CAROLINA

[V.185]

SPRING TERM, 1923

REPORTED BY
ROBERT C. STRONG

RALEIGH
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OF THE

SUPREME COURT OF NORTH CAROLINA

SPRING TERM, 1923

CHIEF JUSTICE:

WALTER CLARK.

ASSOCIATE JUSTICES:

*PLATT D. WALKER,
WILLIAM A. HOKE,
W. P. STACY,
W. J. ADAMS.

ATTORNEY-GENERAL:

JAMES S. MANNING.

ASSISTANT ATTORNEY-GENERAL:

FRANK NASH.

SUPREME COURT REPORTER:

ROBERT C. STRONG.

CLERK OF THE SUPREME COURT:

EDWARD C. SEAWELL.

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---

*At the death of Mr. Justice Walker at the close of the term, Hon. Heriot Clarkson was appointed his successor.

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JUDGES

OF THE

SUPERIOR COURTS OF NORTH CAROLINA

EASTERN DIVISION

W. M. Bond	First	Chowan.
George W. Connor	Second	Wilson.
John H. Kerr	Third	Warren.
F. A. Daniels	Fourth	Wayne.
J. Loyd Horton	Fifth	Pitt.
Henry A. Grady	Sixth	Sampson.
T. H. Calvert	Seventh	Wake.
E. H. Cranmer	Eighth	Brunswick.
N. A. Sinclair	Ninth	Cumberland.
W. A. Devin	Tenth	Granville.

WESTERN DIVISION

H. P. Lane	Eleventh	Rockingham.
Thomas J. Shaw	Twelfth	Guilford.
A. M. Stack	Thirteenth	Union.
W. F. Harding	Fourteenth	Mecklenburg.
B. F. Long	Fifteenth	Iredell.
J. L. Webb	Sixteenth	Cleveland.
T. B. Finley	Seventeenth	Wilkes.
J. Bis Ray	Eighteenth	Yancey.
P. A. McElroy	Nineteenth	Madison.
T. D. Bryson	Twentieth	Swain.

SOLICITORS

EASTERN DIVISION

Walter L. Small	First	Beaufort.
Richard G. Allsbrook	Second	Edgecombe.
Garland E. Midyette	Third	Northampton.
Clawson L. Williams	Fourth	Lee.
Jesse H. Davis	Fifth	Craven.
J. A. Powers	Sixth	Lenoir.
William F. Evans	Seventh	Wake.
Woodus Kellum	Eighth	New Hanover.
T. A. McNeill	Ninth	Robeson.
L. P. McLendon	Tenth	Durham.

WESTERN DIVISION

S. P. Graves	Eleventh	Surry.
J. F. Spruill	Twelfth	Davidson.
F. D. Phillips	Thirteenth	Richmond.
John G. Carpenter	Fourteenth	Gaston.
Zeb V. Long	Fifteenth	Iredell.
R. L. Huffman	Sixteenth	Burke.
J. J. Hayes	Seventeenth	Wilkes.
James M. Carson	Eighteenth	Rutherford.
J. E. Swain	Nineteenth	Buncombe.
George C. Davis	Twentieth	Haywood.

LICENSED ATTORNEYS

SPRING TERM, 1923

The following were licensed to practice law by the Supreme Court, Spring Term, 1923:

ALLEN, JOSEPH THOMAS.....Gibsonville.
ALLEY, JOHN HAYES.....Waynesville.
ANGEL, WILLIAM LENOIR.....Grier, S. C.
BAILEY, RAYMOND GRAVES.....Woodsdale.
BAILEY, ST. CLAIR EDWARD.....Elizabeth City.
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BAKER, JOHN EARLE.....Nashville.
BARKER, OSCAR GARLAND.....Durham.
BEST, HOYT BURNS.....Gallivant's Ferry, S. C.
CARSON, SAMUEL THEODORE, JR.....Bethel.
CATHEY, JOHN HANNIBAL.....Asheville.
CAUDELL, WILLIAM FAY.....St. Paul.
COATES, ALBERT.....Smithfield.
COOK, ALEXANDER EUGENE.....Fayetteville.
COVINGTON, MARY SIMMONS.....Monroe.
COXE, TENCH CHARLES, JR.....Asheville.
CRAWLEY, ALEXANDER WHITFIELD.....Raleigh.
CREEKMORE, THOMAS LEONIDAS.....Raleigh.
CRUTCHFIELD, HARRY LEE.....Greensboro.
DAVIS, RAY PILAND.....Kinston.
DAVIS, JOHN LAWSON.....Statesville.
DEANE, CHARLES BENNETT.....Rockingham.
EURE, JAMES BRUCE.....Ayden.
FOLGER, FRED.....Mt. Airy.
FULTON, FITZHUGH LEE.....Wilmington.
GRAHAM, THOMAS SETTLE, JR.....Greensboro.
HALL, ALTON CARLYLE.....Benson.
HANSON, EDWARD JOSEPHUS.....Charlotte.
HERMAN, PRESTON WINFIELD.....Conover.
HOBBS, EDWARD GIBBON.....Clinton.
HOLMES, HARRY ZACHARY.....Goldsboro.
JENKINS, HERBERT CHARLES.....Asheville.
JENNINGS, JAMES MONROE.....Wilson.
JOHNS, WILLIAM JASPER.....Allendale, S. C.
JOYNER, ANDREW, JR.....Greensboro.
KLUTZ, STONER WARREN.....Maiden.
LAMM, CHARLES CADMUS.....Lucama.
LEE, RALEIGH BRADFORD.....Aurora.
LEGGETT, CHAUNCEY HOKE.....Hobgood.
MCELROY, JOHN HARDWICKE.....Marshall.
MASSEY, WILLIAM HENRY.....Princeton.
MADDREY, JOSEPH THOMAS.....Seaboard.
MONK, EDWIN IRVIN.....Asheville.
MOSS, THOMAS JULIAN.....Forest City.

NICHOLSON, WILLIAM THOMAS.....Statesville.
PAGE, JOHN THOMAS.....Stokes.
PAGE, MATTHEW LEE.....Wade.
PARKER, GERVAS LESTER.....Enfield.
PATTON, GEORGE BRABSON.....Franklin.
PEELE, CURTIS DAVERN.....Lewiston.
PRESSON, GEORGE DAVIS.....Monroe.
PREVATT, NORMAN LESLIE.....Buies.
PROCTOR, JOSEPH ROY.....Rocky Mount.
REDDEN, MONROE MINOR.....Hendersonville.
ROLLINS, SCHURMWAY.....Rutherfordton.
SHEPARD, NORMAN CORNELIUS.....Wilmington.
SINCLAIR, DAVID CUNNINGHAM, JR.....Wilmington.
STROUPE, JOHN CRISTWELL.....Hickory.
STUBBS, DANIEL WEBSTER.....Blount's Creek.
SUMMERSILL, EDWARD WHITE.....Jacksonville.
THOMAS, JOHN SPURGEON.....Saxapahaw.
TROTTER, JOHN PAUL.....Charlotte.
WAGONER, JARVIS ODELL.....Clemmons.
WATSON, SAMUEL.....Loris, S. C.
WILES, WALTER ERASMUS.....Washington, D. C.
WILSON, LATHAM ALDON.....Mt. Olive.
WINECOFF, JAMES BRADSHAW.....Kannapolis.
WHITAKER, GEORGE GAY.....Barnardsville.
WHITLEY, ALEXANDER HINES, JR.....Battleboro.
WILLIAMS, ERWIN THOMPSON.....Lumberton.
WRIGHT, THOMAS BERNARD.....Greensboro.
UPCHURCH, GEORGE EUGENE, JR.....Apex.

Under Comity Act:

GRAYBEAL, WILLIAM THOMAS.....Raleigh.
HEAZEL, FRANCIS JAMES.....Asheville.
JENKINS, WALTER LEE.....Asheville.
SOUTHARD, LAWRENCE GEDDING.....Spartanburg, S. C.
VAN HECKE, MAURICE TAYLOR.....Chapel Hill.

CALENDAR OF COURTS

TO BE HELD IN

NORTH CAROLINA DURING THE FALL OF 1923

SUPREME COURT

The Supreme Court meets in the city of Raleigh on the first Monday in February and the last Monday in August of every year. The examination of applicants for license to practice law, to be conducted in writing, takes place one week before the first Monday in each term.

The Judicial Districts will be called in the Supreme Court in the following order:

	Fall Term, 1923
First District	August 28
Second District	September 4
Third and Fourth Districts	September 11
Fifth District	September 18
Sixth District	September 25
Seventh District	October 2
Eighth and Ninth Districts	October 9
Tenth District	October 16
Eleventh District	October 23
Twelfth District	October 30
Thirteenth District	November 6
Fourteenth District	November 13
Fifteenth and Sixteenth Districts	November 20
Seventeenth and Eighteenth Districts	November 27
Nineteenth District	December 4
Twentieth District	December 11

SUPERIOR COURTS, FALL TERM, 1923

The parenthesis numerals following the date of a term indicate the number of weeks during which the term may hold.

In many instances the statutes apparently create conflicts in the terms of court.

THIS CALENDAR IS UNOFFICIAL

EASTERN DIVISION

FIRST JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Bond.*

Camden—Sept. 24.
Beaufort—July 23*; Oct. 1† (2); Nov. 19; Dec. 17†.
Gates—July 30; Dec. 10.
Tyrrell—July 30†; Aug. 27† (1); Nov. 26.
Currituck—Sept. 3.
Chowan—Sept. 10; Dec. 3.
Pasquotank—Aug. 20* (1); Sept. 17†; Nov. 5‡ (2).
Hyde—Oct. 15.
Dare—Oct. 22.
Perquimans—Oct. 29.

SECOND JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Connor.*

Washington—July 9; Oct. 22.
Nash—Sept. 17* (1); Sept. 24† (1); Oct. 8† Nov. 26* (1); Dec. 3† (1).
Wilson—Sept. 3; Oct. 1†; Oct. 29† (2); Dec. 17.
Edgecombe—Sept. 10; Oct. 15; Nov. 12† (2).
Martin—Dec. 10.

THIRD JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Kerr.*

Northampton—Aug. 6†; Oct. 29 (2).
Hertford—July 30; Oct. 15 (2).
Halifax—Aug. 13 (2); Nov. 26 (2).
Bertie—Aug. 27* (2); Sept. 10† (1); Nov. 12 (2).
Warren—Sept. 17 (2).
Vance—Oct. 1 (2).

FOURTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Daniels.*

Lee—July 16 (2); Sept. 17†; Oct. 29* (1); Nov. 5† (1).
Chatham—July 30‡ (2); Oct. 22.
Johnston—Aug. 13*; Sept. 24† (2); Dec. 10 (2).
Wayne—Aug. 20 (2); Oct. 8† (2); Nov. 26 (2).
Harnett—Sept. 3* (1); Sept. 10† (1); Nov. 12† (2).

FIFTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Horton.*

Pitt—Aug. 20†; Aug. 27; Sept. 10†; Sept. 24†; Oct. 22†; Oct. 29.
Craven—Sept. 3*; Oct. 1† (2); Nov. 19† (2).
Carteret—Oct. 15; Dec. 3†.
Pamlico—Nov. 5 (2).
Jones—Sept. 17.
Greene—Dec. 10 (2).

SIXTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Grady.*

Onslow—July 16†; Oct. 8; Nov. 19† (2); Dec. 3†.
Duplin—July 9* (1); Aug. 27† (2); Oct. 1* (1); Dec. 3 (2).
Sampson—Aug. 6; Sept. 10† (2); Oct. 22 (2).
Lenoir—Aug. 20*; Oct. 15; Nov. 5† (2); Dec. 10*.

SEVENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Calvert.*

Wake—July 9*; Sept. 10*; Sept. 17† (2); Oct. 1†; Oct. 8*; Oct. 22 (2); Nov. 5*; Nov. 26 (2); Dec. 10*.
Franklin—Aug. 27† (2); Oct. 15*; Nov. 12† (2).

EIGHTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Cranmer.*

New Hanover—July 23* (1); Sept. 10* (1); Sept. 17† (1); Oct. 15† (2); Nov. 12* (1); Dec. 3† (2).
Pender—Sept. 24‡ (1); Oct. 29† (2).
Columbus—Aug. 20‡ (2); Nov. 19† (2).
Brunswick—Sept. 3† (1); Oct. 1‡ (1).

NINTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Sinclair.*

Robeson—July 9* (2); Sept. 3† (2); Oct. 1† (2); Nov. 5*; Dec. 3† (2).
Bladen—Aug. 6*; Oct. 15†.
Hoke—Aug. 13 (2); Nov. 12.
Cumberland—Aug. 27*; Sept. 17† (2); Oct. 22† (2); Nov. 19*.

TENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Devin.*

Alamance—Aug. 13*; Sept. 3† (2); Nov. 26*.
Durham—Sept. 17† (2); Oct. 8*; Oct. 29† (2); Dec. 3*.
Granville—July 23 (1); Oct. 22† (1); Nov. 12 (2).
Orange—Aug. 27; Oct. 1†; Dec. 10.
Person—Aug. 6; Oct. 15.

WESTERN DIVISION

ELEVENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Lane.*

Ashe—July 9† (2); Oct. 15.*
Forsyth—July 23* (2); Sept. 10† (2); Oct. 1 (2); Nov. 5† (2); Dec. 3† (1); Dec. 10*.
Rockingham—Aug. 6* (2); Nov. 19† (2).
Caswell—Aug. 20; Dec. 3.
Alleghany—Sept. 24.
Surry—Aug. 27 (2); Oct. 22 (2).

TWELFTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Shaw.*

Davidson—Aug. 20* (1); July 16† (2); Sept. 10† (1); Nov. 19‡ (2).
Guilford—July 30* (1); Aug. 6† (2); Aug. 27† (2); Sept. 17* (2); Oct. 1† (2); Oct. 29† (2); Nov. 12* (1); Dec. 3† (2); Dec. 17* (1).
Stokes—July 9† (1); Oct. 15* (1); Oct. 22† (1).

THIRTEENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Stack.*

Stanly—July 9; Oct. 8†; Nov. 19.
Richmond—July 16†; July 23*; Sept. 3†; Oct. 1*; Nov. 5†; Dec. (31)† (1).
Union—July 30*; Aug. 20† (2); Oct. 15† (1); Oct. 22† (1).
Anson—Sept. 10*; Sept. 24†; Nov. 12†.
Moore—Aug. 13*; Sept. 17†; Dec. 10†.
Scotland—Oct. 29† (1); Nov. 26‡ (2).

FOURTEENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Harding.*

Mecklenburg—July 9* (2); Aug. 27*; Sept. 3† (2); Oct. 1*; Oct. 8† (2); Oct. 29† (2); Nov. 12*; Nov. 19† (2).
Gaston—Aug. 13†; Aug. 20*; Sept. 17† (2); Dec. 3† (2).

FIFTEENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Long.*

Montgomery—July 9*; Sept. 24†; Oct. 1.
Randolph—July 16† (2); Sept. 3*; Dec. 3‡ (2).
Iredell—July 30‡ (2); Nov. 5‡ (2).
Cabarrus—Aug. 13‡ (3); Oct. 15‡ (2).
Rowan—Sept. 10 (2); Oct. 8†; Nov. 19 (2).

SIXTEENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Webb.*

Catawba—July 2 (2); Sept. 3† (2); Nov. 12* (1).
Lincoln—July 16; Oct. 15‡ (1); Oct. 22† (1).
Cleveland—July 23 (2); Oct. 29 (2).
Burke—Aug. 6 (2); Oct. 1† (2); Dec. 10‡ (1); Dec. 17† (1).
Caldwell—Aug. 20 (2); Nov. 26‡ (2).

SEVENTEENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Finley.*

Alexander—Sept. 17 (2).
Yadkin—Aug. 20; Dec. 3 (2).
Wilkes—Aug. 6 (2); Oct. 1† (2).
Davie—Aug. 27; Dec. 3†.
Watauga—Sept. 3 (2).
Mitchell—July 23 (2); Nov. 12 (2).
Avery—July 2† (3); Oct. 15 (2).

EIGHTEENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Ray.*

Transylvania—July 23 (2); Nov. 26 (3).
Henderson—Oct. 1 (2); Nov. 12† (2).
Rutherford—Aug. 20† (2); Oct. 29 (2).
McDowell—July 9 (2); Sept. 17 (2).
Yancey—Aug. 6† (2); Oct. 15 (2).
Polk—Sept. 3 (2).

NINETEENTH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge McElroy.*

Buncombe—July 9† (2); July 23‡ (1); Aug. 6† (2); Aug. 20‡ (1); Sept. 3† (2); Sept. 17‡ (1); Oct. 1† (2); Oct. 15‡ (1); Nov. 5† (2); Nov. 19‡ (1); Dec. 3† (2); Dec. 17‡ (1).
Madison—Aug. 27; Sept. 24; Oct. 22; Nov. 26.

TWENTIETH JUDICIAL DISTRICT

FALL TERM, 1923—*Judge Bryson.*

Haywood—July 9; Sept. 17 (2); Nov. 26 (2).
Cherokee—Aug. 6 (2); Nov. 5 (2).
Jackson—Oct. 8 (2).
Swain—July 23 (2); Oct. 22 (2).
Graham—Sept. 3 (2).
Clay—Oct. 1.
Macon—Aug. 20 (2); Nov. 19 (1).

*Criminal cases. †Civil cases. ‡Civil and jail cases.

UNITED STATES COURTS FOR NORTH CAROLINA

DISTRICT COURTS

Eastern District—Henry G. Connor, *Judge*, Wilson.
Western District—James E. Boyd, *Judge*, Greensboro
Western District—Edwin Yates Webb, *Judge*, Shelby.

EASTERN DISTRICT

Terms—District terms are held at the time and place as follows:

Raleigh, fourth Monday after fourth Monday in April and October. Civil terms, first Monday in March and September. S. A. Ashe, Clerk.

Elizabeth City, second Monday in April and October. J. P. Thompson, Deputy Clerk, Elizabeth City.

Washington, third Monday in April and October. Arthur Mayo, Deputy Clerk, Washington.

New Bern, fourth Monday in April and October. Albert T. Willis, Deputy Clerk, New Bern.

Wilmington, second Monday after the fourth Monday in April and October. C. M. Symmes, Deputy Clerk, Wilmington.

Laurinburg, Monday before the last Monday in March and September. S. A. Ashe, Clerk, Raleigh.

Wilson, first Monday in April and October. S. A. Ashe, Clerk, Raleigh.

OFFICERS

Irvin B. Tucker, United States District Attorney, Whiteville.
J. D. Parker, Assistant United States District Attorney, Smithfield.
Willis G. Briggs, Assistant United States District Attorney, Raleigh.
R. W. Ward, United States Marshal, Raleigh.
S. A. Ashe, Clerk United States District Court, Raleigh.

WESTERN DISTRICT

Terms—District Terms are held at the times and place as follows:

Greensboro, first Monday in June and December. R. L. Blaylock, Clerk; H. M. Causey, Chief Deputy; Myrtle Dwiggins, Deputy.

Statesville, third Monday in April and October. J. B. Gill, Deputy Clerk.

Asheville, first Monday in May and November. J. Y. Jordan and O. L. McLurd, Deputy Clerks.

Charlotte, first Monday in April and October. E. S. Williams, Deputy Clerk.

Wilkesboro, fourth Monday in May and November. Milton McNeill, Deputy Clerk.

Salisbury, fourth Monday in April and October. J. B. Gill, Deputy Clerk, Statesville.

OFFICERS

Frank A. Linney, United States District Attorney, Charlotte.
Chas. A. Jonas, Assistant United States Attorney, Lincolnton.
Thos. J. Harkins, Assistant United States Attorney, Asheville.
Brownlow Jackson, United States Marshal, Asheville.
R. L. Blaylock, Clerk United States District Court, Greensboro.

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CASES

ARGUED AND DETERMINED
IN THE

SUPREME COURT

OF

NORTH CAROLINA

AT

RALEIGH

ERRATA

Vol. 183, p. 270, line 19 from top "investing" should be vesting.

Vol. 183, p. 462, line 14 from top, "relieves" should be relieve.

Vol. 184, p. 152, line 9 of opinion, "promissor" should be promisor, and "promissee" should be promisee.

defeated by his dying and leaving him surviving child or children, and he may not convey an absolute fee-simple title. Whether the ulterior limitation to his nearest heirs would otherwise give him the fee-simple title under the rule in *Shelley's case, quere?*

APPEAL by plaintiff from *Kerr, J.,* at December Term, 1922, of CHOWAN.

Controversy without action, submitted on an agreed statement of facts.

Plaintiff, being under contract to convey certain land to the defendant, executed and tendered a deed therefor and demanded payment of the purchase price as agreed. The defendant declined to accept the deed and refused to make payment, claiming that the title offered was defective.

Upon the facts agreed, the court being of opinion that the deed tendered was insufficient to convey a good and indefeasible title, gave judgment for the defendant; whereupon the plaintiff excepted and appealed.

Herbert Leary for plaintiff.
No counsel for defendant.

STACY, J. On the hearing the title offered was properly made to depend upon the construction of the following clause in the will of Mrs. Elizabeth J. Burke:

"I loan to Elisha Burke White during his natural life my home tract of land where I now live, . . . also, the Darden or Dillard land (description not in dispute), and after his death to such child or children as he may have or leave lawfully begotten of his body to be equally divided share and share alike between them, but if he should not leave any children, then said property shall go to his nearest heirs."

The case states that Elisha Burke White, plaintiff in this action, at the time of the death of the testatrix in 1904, was unmarried, but that he has since married and is now the father of three living children, the oldest being fourteen years of age.

Plaintiff contends that under the foregoing clause in the will of Mrs. Elizabeth J. Burke he holds a fee-simple title to the land sought to be conveyed, by virtue of the operation of the rule in *Shelley's case;* while the defendant contends that, under the provisions of said clause, the plaintiff took only a life estate in the property so devised.

We think it is manifest that the plaintiff cannot convey a full and absolute title to the land in question, even though he should be held to take a defeasible fee by reason of the ulterior limitation to "his nearest heirs." Conceding, without deciding, that, for the purpose of hereditary transmission, the plaintiff may be seized of an estate in fee simple, yet this, by the express terms of the instrument under which he holds, is liable to be defeated by his dying and leaving him surviving a child or children. *Stewart v. Kenower*, 62 Pa., 288; note, 29 L. R. A. (N. S.), 997 *et seq.* See, also, *Whitesides v. Cooper*, 115 N. C., 570, and cases there cited.

The ruling of the court below must be upheld.

Affirmed.

G. S. EMORY v. M. T. CREDLE AND R. H. HUDSON, OWNERS OF GAS BOAT "CLINTON," AND T. M. CREDLE, MASTER.

(Filed 21 February, 1923.)

1. Navigable Waters—Carriers of Freight—Commerce—Boats—Fires—Damages—Owner's Liability—Federal Statutes.

A gas boat, duly registered at the United States Custom House and licensed to do business as a common carrier on the inland waterways of the State, while engaged in the part transportation of an interstate shipment of goods, comes within the provisions of the Federal statutes relieving the owners from liability for damages caused by fire, unless it is caused by the design or neglect of the owner.

2. Same—Employer and Employee.

The Federal statutes excluding liability from the owners of vessels for damages by fire to an interstate shipment of goods, when applicable, is held to mean that the owners are not liable for the loss of the goods or injury thereto by fire happening on board, unless from design (an act of willfulness) on their part, or from a negligent breach of some duty incumbent upon them as owners, or in which they have personally participated; and they may not be held for loss and injury by fire due entirely to the negligence of the crew, master or seamen.

3. Same — Instructions—Respondeat Superior—Appeal and Error—Reversible Error.

In an action to recover damages from the owners and the master of a vessel employed in an interstate shipment of goods as a common carrier, duly licensed as such under the Federal statutes, when there is evidence that the loss incurred was due entirely to the negligence of the crew, master or seamen employed on the vessel, an instruction that makes the owner responsible for the sole negligence of such employees under the doctrine of *respondeat superior* is reversible error.

CIVIL ACTION, heard on appeal from a justice's court, before *Kerr, J.*, and a jury, at Fall Term, 1922, of HYDE.

The action is to recover damages for loss and destruction of goods by fire, shipped on the gas boat "Clinton," as common carrier, plying on the inland and navigable waters of the State, in this instance between Washington, N. C., and Swan Quarter, and other points in Hyde County. It was admitted that defendants were owners of the boat, and that the same was duly registered in United States Custom House, and it was shown that the owners were not present at the occurrence, but the boat at the time was in immediate charge and control of T. M. Credle, and an assistant as employees, and who had no interest in the boat or its cargo. The owners answered, denying any negligence on their part and alleging that the boat on which the goods were transported was duly registered in United States Custom House, and that the fire and consequent destruction of the goods was not caused from any design or neglect on their part, and claiming that they were protected by the Federal statutes relating to limitation of liability on the part of owners of such vessels.

On issues submitted, the jury rendered the following verdict:

"1. Who are the owners of the gas screw 'Clinton,' alleged to be destroyed by fire on or about 25 May, 1922? Answer: 'M. T. Credle and R. H. Hudson.'

"2. Was the said boat and the plaintiff's property destroyed by the negligence of the defendants and owners, as alleged in the complaint? Answer: 'Yes.'

"3. What, if any, damages has plaintiff sustained by reason of said negligent destruction of his property? Answer: '$140.' "

Judgment on verdict against the owners, M. T. Credle and R. H. Hudson, and said defendants, having duly excepted, appealed.

S. S. Mann for plaintiff.
Small, MacLean & Rodman and Walter L. Spencer for defendants.

HOKE, J., after stating the case: There were facts in evidence tending to show that on or about 26 April to 1 May, 1922, plaintiff bought, in Norfolk, Va., a lot of goods, of value of $165, and shipped same *via* Washington, N. C., to his home at Juniper Bay, Hyde County, N. C. That the bill of lading was given to T. M. Credle, who with an assistant was operating the gas boat "Clinton," duly registered and licensed to do business as common carrier on the waters of Pamlico Sound and its tributaries. That said goods were taken on said boat under a bill of lading by said T. M. Credle, and at the time specified in going from Swan Quarter, where the boat had touched in due course of its voyage, the cargo and boat were destroyed by fire, except the engine, which T. M. Credle testifies was saved (value not given).

There were also facts in evidence permitting the inference that the loss and destruction of the boat and goods were due to negligence on the part of the owners themselves, and there was also evidence to the effect that the fire and consequent loss of the boat was due to the negligence of the master and his assistant.

On this opposing evidence, the court, among other things, and on second issue, charged the jury as follows: "If you answer the second issue 'No,' you need not answer the third issue, because, unless the damage done the plaintiff was due to the negligence or want of care on the part of the defendant, or employees of the defendants, then the defendants would not be liable in damages to the plaintiff. That is, if the plaintiff has failed to show by the greater weight of the evidence that want of care in the burning of the vessel was due to negligence on the part of the owners of the vessel, or some of the employees or agents of the owners who had control of the vessel, and you answer the second issue 'No,' you need not answer the third issue." Defendants duly noted an exception.

As more especially pertinent to the facts presented, the Federal legislation establishing limitations of liability on the part of owners of vessels operating as carriers both at sea and on the navigable inland waters of the State, makes provision as follows:

"Sec. 4282, Revised Statutes, U. S. *Loss by Fire.* No owner of any vessel shall be liable to answer for or make good to any person any loss or damage which may happen to any merchandise whatsoever which shall be shipped, taken in, or put on board any such vessel, by reason

or by means of any fire happening to or on board the vessel, unless such fire is caused by the design or neglect of such owner."

And in sec. 4289, as amended and now appearing in 6th Federal Statutes Annotated, p. 367: *"Limitations of Liability of Owners to Apply to All Vessels.* The provisions of the seven preceding sections and of section 18 of an act entitled 'An act to remove certain burdens on the American merchant marine and encourage the American foreign-carrying trade, and for other purposes,' approved 26 June, 1884, relating to the limitations of the liability of the owners of vessels, shall apply to all sea-going vessels, and also to all vessels used on lakes or rivers or in inland navigation, including canal boats, barges, and lighters."

In construing these sections it has been held that the same applies to a boat of this kind, and in determining the question of the liability of the owners, the authoritative cases are to the effect that the owners are not liable for the loss of the goods or injury thereto by any fire happening on board, unless from design on their part (an act of willfulness) or from a negligent breach of some duty incumbent upon them as owners, or in which they have personally participated, and that they may not be held for loss and injuries by fire due entirely to the negligence of the crew, master or seamen. *Craig v. Continental Ins. Co.,* 141 U. S., 638; *In re Garnett et al.,* 141 U. S., 1; *Walker v. Transportation Co.,* 3 Wall., 140; The ....., 228 Fed., 1006; *The Anno.,* 47 Fed., 525, and see on subject, *Brinson v. R. R.,* 169 N. C., 425; 6 Fed. Statutes Anno., p. 339.

While the court in different places seems to restrict the jury to a consideration of the owners' liability as set forth in the Federal statutes, the portion of the charge excepted to permits, if it does not require, the jury to hold the owners liable for the negligence of the crew, under the general doctrine of *respondeat superior,* and in which the said owners did not or may not have personally shared.

For this error the defendants are entitled to a new trial, and it is so ordered.

New trial.

VICTOR LEWIS v. G. V. LEWIS.

(Filed 21 February, 1923.)

Wills—Estates—Inheritance—Death of Devisor—Presumption of Death—Deeds and Conveyances.

The father devised his lands to his four sons as tenants in common, and one of them conveyed to the other, after his father's death, all of his "right, title and interest in and to the estate of my late father." One of the sons left home before the death of his father and was not heard of for

a period of seven years under circumstances upon which the law would presume his death, and cast the inheritance from him upon his other brothers: *Held*, the presumption of death did not fix the time thereof at any definite time within the seven-year period, and it being necessary for the grantee in the deed to show that his brother predeceased his father, only that part of the land his grantor took under his father's will passed under the deed.

APPEAL by defendant from *Ferguson, J.*, at November Special Term, 1922, of WASHINGTON.

Civil action to recover of the defendant a one-third interest in the lands of Tasso Lewis, presumably deceased brother of both plaintiff and defendant.

Upon the facts agreed, his Honor rendered judgment in favor of the plaintiff. Defendant appealed.

Van B. Martin for plaintiff.
Zeb Vance Norman for defendant.

STACY, J. On 2 September, 1895, W. W. Lewis of Washington County died, leaving a last will and testament in which he devised a tract of land, containing 160 acres, more or less, to his four children, Eliza H. Lewis, G. V. Lewis, Victor Lewis, and Tasso Lewis, as tenants in common, subject only to a life estate which was given to the testator's wife.

On 13 March, 1896, Victor Lewis, plaintiff herein, conveyed to his brother, G. V. Lewis, defendant herein, by full warranty deed, all his "right, title, and interest in and to the estate (real, personal, and mixed) of my late father."

Some time during the year 1894, Tasso Lewis left the State of North Carolina, and, at the time of his father's death, he was thought to be somewhere in the State of Virginia, but he has never been seen or heard of since his departure in 1894 by any member of his family, or by any other person likely to have heard, so far as the parties to this suit are able to ascertain.

It is conceded that Tasso Lewis is presumably dead, but there is no finding as to when he died. It is also conceded that his share in his father's estate would go to the other devisees under the will of W. W. Lewis, whether Tasso predeceased his father or not. The crucial question is: Do they take as heirs of their father or as heirs of their brother, Tasso?

The defendant contends that the land in question was originally a part of his father's estate, and that the plaintiff, by his deed of 13 March, 1896, conveyed to him all his right, title, and interest therein. The plaintiff, on the other hand, contends that he is entitled to a one-third

interest in the land as heir to his brother Tasso, and that nothing passed by his deed of 13 March, 1896, except the one-fourth interest which he acquired as devisee under his father's will.

There is no presumption that Tasso Lewis was dead when his father died in 1895, nor is there any presumption that he was dead at the time of the execution of the plaintiff's deed in 1896. Manifestly, the interest which the plaintiff derives from his brother Tasso is as distinct from the interest he had in his father's estate as if he had acquired his title from a stranger, or any other source. Indeed, if Tasso were living at the time, the plaintiff had no such interest when the deed was made. *Gilbert v. James,* 86 N. C., 245.

Where a party has been absent from his home or domicile for a period of seven years, without being heard of by those who would be expected to hear from him, the only presumption arising from such absence is that he is then dead; that is, at the end of the seven-year period; but there is no presumption as to the exact time of his death. *Beard v. Sovereign Lodge,* 184 N. C., 154, and authorities there cited.

In the English case of *Dunn v. Snowden,* 11 W. R., 160, it was held that where a party who takes under a will has not been heard of for seven years, the testator having died after three years had elapsed, and advertisement issued on the death of the testator, failing to produce any information, such legatee must be assumed to have survived the testator, and cannot be presumed to have died at any particular period during the seven years. See 1 Greenleaf on Evidence, sec. 41.

In the case at bar, the defendant's title being dependent upon his showing that Tasso Lewis predeceased his father, and there being no evidence or presumption to establish the fact, we must uphold the judgment in favor of the plaintiff.

No error.

KINSTON COTTON MILLS v. WACHOVIA BANK AND TRUST COMPANY.

(Filed 21 February, 1923.)

1. Corporations—Preferred Stock—Contracts—Debtor and Creditor.

Preferred stock issued by an industrial corporation under the general law confers upon the holders a preference over the common stock, it being ordinarily the right to a fixed dividend to be paid out of the net earnings of the company before any dividend on the common stock is allowed, and frequently including this preference in the distribution of the corporate assets among the shareholders in case of dissolution, etc., the relation thus established between the different classes of stockholders being largely one of contract with the company, subordinate always to statutory or charter provisions controlling the matter.

2. Same.

Where preferred shares of stock are issued by an industrial corporation under powers conferred upon it in general terms, the holders may not be regarded as corporate creditors, or given a position superior to such creditors, for they are but a part of the company, and cannot occupy the position both of creditor and debtor towards the company.

3. Same—Preference.

The holders of preferred stock in an industrial corporation cannot be given a priority over its creditors by contract with the directors acting under general powers, but only by virtue of legislative authority clearly and definitely conferred.

4. Same—Liens—Mortgages—Bonds.

Where an industrial corporation has amended its charter under our general laws, ch. 22, art. 2, passed in pursuance of our Constitution, Art. VIII, sec. 1, etc., and thereunder issues stock preferred over the common stock as to dividends, and the distribution of its assets in case of dissolution, the purchasers of such preferred stock can acquire no lien superior to that of a mortgage bond regularly issued by the corporation, whether such mortgage lien were created before or after the issuance of the preferred stock.

CLARK, C. J., concurs in result.

CONTROVERSY without action, submitted and heard by consent before *Brock, J.*, at Wadesboro, N. C., 1 December, 1922.

On perusal of the record, it appears that plaintiff, a business corporation, professing to act under powers conferred by its charter, have contracted to issue bonds to amount of $200,000, secured by a deed of trust on the property and franchise of plaintiff company, which said bonds and deed of trust shall be a valid first lien and mortgage on the property of the company, both as to principal and interest, above any possible lien or claim on its assets by reason of the preferred stock issued now or hereafter under an amendment to its charter hereinafter set out. Defendant has agreed to take said bonds under the terms referred to, and the question submitted is whether said bonds so secured shall constitute a first lien as stipulated. The court being of opinion that said bonds and interest and mortgage to secure same will constitute such first lien, etc., entered judgment that defendant comply with its contract, and defendant excepted and appealed.

Cowper, Whitaker & Allen for plaintiff.
Manly, Hendren & Womble for defendant.

HOKE, J. On the hearing it was further made to appear that plaintiff is an industrial corporation, organized and doing business under and by virtue of a charter granted in accord with the Constitution and general

statutes controlling the matter. Constitution, Art. VIII, sec. 1, etc., and C. S., ch. 22, art. 2, etc., and that on 14 February, 1920, its said charter, in reference to the issuing of preferred stock, was duly and properly amended so as to read as follows: "That further said article four of said certificate of incorporation be changed and amended by providing for the creation of preferred stock as well as and in addition to the common stock, by adding the following to said article: That in addition to the aforesaid common stock hereinbefore authorized the said Kinston Cotton Mills is also authorized to issue not to exceed $350,000, divided into 7,000 shares of the par value of $50 per share each of cumulative preferred stock. That said preferred stock may be issued as and when the board of directors in their discretion shall determine to so issue same, and shall entitle the holder or holders thereof to receive out of the surplus of the net earnings of said corporation, and said corporation shall be bound to pay thereon, as and when declared by said board of directors, a dividend at such rate and at such time or times per annum as shall be determined by said board of directors, which shall be set apart and paid before any dividends on the common stock, and which shall be a first lien and priority upon all the assets, real and personal, of said corporation, all of which shall be fully provided for by said board of directors, together with all and any other preferences, terms, conditions and stipulations in reference thereto as may be determined and directed by said board of directors of said corporation. That said preferred stock may be issued in such series and amounts, and at such time or times, and shall mature and be retired in such manner as said directors may deem wise and proper, but said corporation shall at all times hereafter have the power and be allowed to issue and have outstanding preferred stock as hereinbefore described, not to exceed at any one time the amount hereinbefore authorized. Provided, however, that whenever a dividend is declared and paid on the preferred stock and any and all series thereof as hereinbefore set forth, the directors shall, if in their judgment the surplus or net profits, after deducting the amount of the dividends to accrue and be paid on such preferred stock during the current year, shall be sufficient for such purpose, have the full power then or thereafter to declare and pay a dividend on the common stock of said corporation.

"In case of liquidation or dissolution or distribution of the assets of said corporation, the holders of the preferred stock herein provided for, or any series or issues thereof, shall be paid the principal amount of their preferred shares and the amount of dividends accumulated and unpaid thereof (which shall be secured and have priority and lien as above set forth) before any amount shall be payable to the holders of the common stock."

That acting under the powers so conferred, plaintiff has issued and sold preferred stock to the nominal amount of $130,000, which is now outstanding, and the purchasers of same were given and now hold certificates of their respective shares, which in form substantially comply with the above amendment, and with section 1156 of said chapter 22, the section more directly relevant to such an issue, and, among others, containing in the face of the certificate stipulations as follows: "The holders of this preferred stock are entitled to receive and the corporation is bound to pay a yearly dividend of seven per cent per annum, said dividend to be paid semiannually on 1 June and 1 December of each year succeeding the date hereof, out of the net earnings of said corporation, which said dividends shall be set apart and paid before any dividends on the common stock, and shall be a first lien and priority upon the assets, real and personal, of said corporation, as fully provided for such preferred stock authorized under the aforesaid amendment to the certificate of incorporation and set forth in resolution of the board of directors under date of 3 March, 1920." And said plaintiff proposes to issue further shares of said stock in pursuance and within limits of the above resolution. Upon these the facts chiefly pertinent it is contended by defendant that plaintiff is not in a position to comply with their contract stipulating for a superior lien on the corporate assets, and by reason chiefly of the clause in the amended charter declaring that the holder of this stock, out of the surplus of the net earnings and when determined upon and set apart by the board of directors, shall be entitled to the stipulated dividends before any dividends may be paid on the common stock and giving to such holders in further security for such dividends only "a first lien and priority on all the assets, real and personal, of the corporation, all of which shall be provided for by said board of directors, together with all and any other preferences, terms, conditions, and stipulations in reference thereto as may be determined and directed by said board of directors, etc.," but, on the facts presented, the position cannot be sustained. Preferred stock, as the term indicates, is designed to give the holders some preference over the common stock, and ordinarily is met by conferring upon such holder the right to a fixed dividend out of the net earnings of the company, when such dividend has been properly declared by corporate authority and due and payable before any dividends on the common stock is allowed. Not infrequently this preference is extended to giving the holders, as in this case, priority over the common stock, in distribution of the corporate assets in case of dissolution, and there are other preferences permissible, the question as between the different classes of stockholders being largely one of contract with the company, subordinated always to statutory or charter provisions controlling the matter, but where such stock is issued under powers con-

ferred upon the company in general terms, the holders may not be regarded as corporate creditors, nor can they by contract with the directors be given a superior position to the detriment of creditors. Under the conditions suggested they are but a part of the company, and as said in some of the cases on the subject, if these holdings are in fact and truth preferred stock, the holders cannot occupy the position both of creditor and debtor towards the company. These positions are in accord with authority very generally prevailing, and with our own decisions so far as they have dealt with the subject. *Farrish v. Cotton Mills,* 157 N. C., 188; *Power Co. v. Mills Co.,* 154 N. C., 76; *Warren v. King,* 108 U. S., 389; *Lloyd v. Pa. Electric Co.,* 75 N. J. Eq., 263; *Black v. Hobart Trust Co.,* 64 N. J. Eq., 415; *Hamlin v. Toledo Trust Co.,* 78 Fed., 664; *Spencer v. Smith,* 201 Fed., 647; 1 Cook on Corporations (7 ed.), sec. 271; Clark on Corporations, pp. 365-367; 14 C. J., p. 416. There are, it is true, cases where holders of these certificates under the term of preferred stock have been given priority even over creditors, but this, as stated, may not be done by mere contract with the directors acting under general powers, but only by virtue of legislative authority clearly and definitely conferred. An instance being the case of *Heller v. Marine Bank,* 89 Md., 602, reported, also, in 73 A. S. R., p. 212, with a full and informing editorial note on the subject. But no such conditions are presented in the case before us; on the contrary, it appears that these holdings are in terms and effect preferred stock, having the right to a fixed dividend out of the net earnings when declared by the directors, and to a further preference over the common stock in any distribution of the assets, and considering the record in view of the authorities heretofore cited, and the principles they approve, the language and purport of the body of the amendment, together with the closing paragraph by which these certificates are clearly subordinated to creditors in any distribution of the assets, we are of opinion that the effect and purpose of said amendment and the certificates issued in pursuance thereof is not to create any lien or priority of any kind as against creditors, but only to establish an additional preference as between the different classes of stock, and approve and affirm, therefore, the decision of the court below that defendants comply with their contract.

Affirmed.

CLARK, C. J., concurs in result.

T. J. DAYTON ET AL. V. CITY OF ASHEVILLE.

(Filed 21 February, 1923.)

1. Pleadings—Statutes—Allegations—Eminent Domain—Cities and Towns—Municipal Corporations.

An allegation in the complaint that defendant city was operating an incinerator near his land and dwelling, causing continuing injury to his dwelling and to the health of his family by its fumes, smoke and ashes, settling upon his furniture, etc., and of a permanent or continuous character, is liberally construed under the terms of our statute, C. S., 535, not only as an allegation of trespass, but also of a partial taking or appropriation of plaintiff's property for a public use.

2. Municipal Corporations—Cities and Towns—Trespass—Eminent Domain—Constitutional Law.

While the city, under its public duty, is not liable to individuals for injuries resulting from the operation of an incinerator for the public benefit, properly built and operated under its government authority, that amounts to an irregular, intermittent and variable trespass, in the absence of some legislative authority conferring such right of action, it is otherwise when the trespass is constant and continuous and amounts to an appropriation of the plaintiff's property for a public use without compensation.

3. Same—Actions—Statute of Limitations—Charter Provisions—Notice—Damages.

In an action to recover damages against a city caused by the operation by the city of an incinerator near the plaintiff's land, and there is allegation and evidence tending to show damages of a continuous and permanent nature amounting to a taking or appropriation in part of the plaintiff's land for a public use without compensation, upon the defendant's plea of the statute of limitations and the failure to give the notice prerequisite to the right of action, provided in the defendant's charter, and conflicting evidence thereon, the cause of action accrues and the statute begins to run from the time the first substantial injury is sustained, or when the first appreciable damage is done.

4. Same—Verdict—New Trials—Appeal and Error.

Where, in an action to recover damages from a city for the taking of plaintiff's land for a public use without compensation, the city has pleaded the statute of limitation and set up as a defense the failure of the defendant to notify the city under the terms or provisions of its charter, and there is no finding by the jury as to the time the first substantial injury, etc., was sustained by the plaintiff, the cause will be remanded for a new trial, and upon this appeal *it is held* that it is unnecessary to decide whether the three-year or ten-year statute would be applicable to a suit of this kind. C. S., 441 (1), 445.

5. Municipal Corporations—Cities and Towns—Actions—Notice—Charter Provisions—Burden of Proof—Pleadings.

Where there is a provision in a city charter requiring the one injured in person or property to give a certain written notice thereof to the city

as a prerequisite to his right of action, the plaintiff in such suit must allege and prove that he has complied with this provision, in the absence of a valid excuse.

APPEAL by defendant from *Lane, J.*, at August Term, 1922, of BUNCOMBE.

Civil action to recover compensation for the partial taking or injury to plaintiffs' lands, located within the corporate limits of the city of Asheville.

From a verdict and judgment in favor of plaintiffs, the defendant appealed, assigning errors.

George Pritchard, McKinley Pritchard, and Stevens, Anderson & Stevens for plaintiffs.

George Pennell and J. W. Haynes for defendant.

STACY, J. This action was instituted on 6 May, 1921, by T. J. Dayton and wife against the city of Asheville to recover damages or compensation for the partial taking or injury to two houses and lots, located in said city, the alleged injury or damage resulting, according to the plaintiff's contention, from the construction, maintenance, and operation by the defendant, in the exercise of a governmental duty, of an incinerator, for the purpose of destroying and burning city garbage, refuse, etc., on an adjacent lot, or one in close proximity to plaintiffs' property. There was allegation and evidence tending to show that said incinerator was built by the defendant in the year 1913; that it was put into use or operation in 1914; and that by reason of its erection, location, and continuous operation in close proximity to plaintiffs' property, the said houses and lots, from time to time, have been and continue to be enveloped in smoke arising therefrom, which said smoke, together with greases and ashes, constantly settle upon, damage, and injure plaintiffs' houses and lots, and every particle of household furniture and other articles located in said houses or on said lots. There was also allegation and proof to the effect that the carcasses of dead animals, together with obnoxious decayed vegetable matter, are constantly hauled to said incinerator for the purpose of being destroyed and burned therein, and that foul, offensive, and noxious odors, caused by the operation and maintenance of said incinerator, constantly pollute the atmosphere in the immediate vicinity of plaintiffs' houses and lots to such an extent as to be a menace and danger to the health of persons occupying said premises, and rendering those portions of plaintiffs' lots, which were formerly fit for cultivation and gardening, now useless for such purposes.

The defendant denies any and all liability, and its evidence is in sharp conflict with that of the plaintiffs; but the chief question debated before

us, and upon which the defendant mainly relies, is that the plaintiffs' cause of action, if any they have, is barred by the three-year statute of limitations and the following provision in the defendant's charter:

"Sec. 204. No action for damages against said city of any character whatever to either person or property shall be instituted against said city, unless within ninety days after the happening or infliction of the injury complained of, the complainant, his executors or administrators, shall have given notice to the board of aldermen of said city for such injury, in writing, stating in such notice the date and place of happening or infliction of such injury, the manner of such infliction, the character of the injury, and the amount of damages claimed therefor; but this shall not prevent any time of limitation prescribed by law from commencing to run at the date of the happening or infliction of such injury, or in any manner interfering with its running."

Plaintiffs' first claim for damages was filed 23 April, 1921. Upon the issue as to whether the cause of action is barred, his Honor directed an answer in favor of the plaintiffs; and, to this instruction, the defendant excepts and assigns same as error. It is true his Honor limited the jury in its award of damages to such as had been sustained in the three years next immediately preceding the commencement of the action, together with such further damages as were likely to occur in the future; and this upon the theory of a renewing, intermittent, and recurring trespass. *Duval v. R. R.*, 161 N. C., 448; *Roberts v. Baldwin*, 155 N. C., 279. But this, we think, was a misconception of the real basis of plaintiffs' cause of action. The complaint, giving it a liberal construction (C. S., 535), contains, not only an allegation of trespass, but also a charge of taking or appropriating plaintiffs' property without just compensation. The alleged injury consists in the doing of a lawful act, but in such a manner as to amount to a partial taking of the property in question for a public use. *Mason v. Durham*, 175 N. C., 638; *Rhodes v. Durham*, 165 N. C., 679; *Donnell v. Greensboro*, 164 N. C., 330; *Hines v. Rocky Mount*, 162 N. C., 410; *Moser v. Burlington*, 162 N. C., 141; *Little v. Lenoir*, 151 N. C., 415; *Selma v. Jones*, 202 Ala., 82; 10 R. C. L., 71.

Indeed, the city having a right to erect the incinerator and to maintain it for the benefit of the public, in the exercise of a governmental duty, it will not be held civilly liable to individuals for injuries resulting therefrom, when properly built and operated, upon the theory of a trespass, in the absence of some legislative authority or a statute conferring such right of action. *James v. Charlotte*, 183 N. C., 630, and cases there cited. But the denial of a right to recover against a municipality for an alleged injury upon the theory of its constituting a trespass does not militate against the right of recovery for a taking or appro-

priating, in whole or in part, of property for a public use without due compensation. *Lloyd v. Venable,* 168 N. C., 531; *Jacobs v. Seattle,* 160 Pac., 299 (incinerator), reported on second appeal in 171 Pac., 662; *Keene v. Huntington,* 92 W. Va., 713; L. R. A., 1917 F, 475 (incinerator); *Donnell v. Greensboro,* 164 N. C., 330; *Metz v. Asheville,* 150 N. C., 748. "Public necessity may justify the taking, but cannot justify the taking without compensation." *Platt Bros. v. Waterbury,* 72 Conn., 531. See, also, *Boise Valley Const. Co. v. Kroeger,* 28 L. R. A. (N. S.), 968, and note, which contains a valuable collection of the authorities on the subject.

The distinction here made becomes important upon the question of the statute of limitations and when the cause of action first accrued. It is conceded that for an irregular, intermittent, and variable trespass, if the defendant be liable for such a tort at all, plaintiffs would be entitled to recover any and all such damages as have accrued within the three years next immediately preceding the commencement of the action, provided proper claim had been made therefor as required by the city charter. *Roberts v. Baldwin,* 151 N. C., 408; *Barcliff v. R. R.,* 168 N. C., 270. But upon the theory of a taking or appropriating, in whole or in part, of plaintiffs' property under the power of eminent domain and in the exercise of a governmental function, where the injury is permanent, constant, and continuous in its nature, as alleged by the plaintiffs here, the cause of action accrues and the statute of limitations begins to run in such cases from the time when the first substantial injury is sustained, or when the first appreciable damage is done. *Staton v. R. R.,* 147 N. C., 428; *Ridley v. R. R.,* 118 N. C., 1010; *Hocutt v. R. R.,* 124 N. C., 214; *Stack v. R. R.,* 139 N. C., 366; *Gulf C. & S. Co. v. Moseley,* 20 L. R. A. (N. S.), 885, and note. See, also, valuable and instructive notes in L. R. A., 1916 E, 997, and 36 L. R. A. (N. S.), 673. Obviously, there is a distinction between the injury and the source or cause of the injury. *Houston Waterworks v. Kennedy,* 8 S. W. (Tex.), 36. "It is well settled that the injury is the cause of action, and that no statute of limitations can begin to run before the cause of action accrues." *Douglas, J.,* in *Hocutt v. R. R.,* 124 N. C., 219. See, also, C. S., 405.

It may be well to note that a renewing or recurring injury caused by the "construction of a railroad or repairs thereto," although such construction or work is done in the exercise of powers conferred by the Legislature for that purpose, by the express terms of the statute, C. S., 440 (2), the injury is denominated a *trespass,* and a remedy is accordingly provided therefor. *Savage v. R. R.,* 168 N. C., 241. But where the cause of action rests upon an implied promise or contract to pay a just and reasonable compensation, it would seem, of necessity, that such cause of action must take its rise as of the date of the making of said

implied promise or contract; and this, under our decisions, arises at the time of the first substantial injury. *Staton v. R. R., supra,* and cases there cited. "If a structure, when completed, is permanent in character, but not necessarily a nuisance, and afterwards becomes one, the statute begins to run from the time an injury is received, and not from the time the structure is erected." Note to *Eells v. Chesapeake, etc., Ry. Co.*, 87 Am. St. Rep., 792, citing a number of authorities.

The plaintiffs, under the provisions of the city charter, were required to show that their claim for compensation had been filed with the board of aldermen of the defendant city within ninety days after the first substantial injury to their property which is alleged to have been caused by the maintenance and operation of said incinerator. *Cresler v. Asheville,* 134 N. C., 311. It has been held with us, in a number of cases, that, as a prerequisite to a suit of this kind, in the absence of a valid excuse (*Hartsell v. Asheville*, 166 N. C., 633), it is necessary both to allege and to prove that a demand was made upon the municipal authorities before commencing action, such requirement being incorporated in the city charter. *Hartsell v. Asheville*, 164 N. C., 195; *Pender v. Salisbury,* 160 N. C., 365; *Terrell v. Washington,* 158 N. C., 281.

In the instant case this question has not been passed upon by the jury, and the evidence is conflicting as to when the first substantial injury was sustained, or when the first sensible impairment of plaintiffs' property occurred. The defendant's evidence is to the effect that no appreciable damage was suffered at any time. Hence, the cause must be remanded for a new trial.

The plaintiffs' claim for damages or compensation having been filed with the board of aldermen of the defendant city on 23 April, 1921, it follows that, if the first substantial injury was sustained within ninety days prior thereto, the three-year statute of limitations, as set up by the defendant, can have no effect upon the instant suit. It is, therefore, unnecessary for us to decide, at the present time, whether the three-year statute of limitations (C. S., 441, subsec. 1), or the ten-year statute (C. S., 445) would be applicable to a suit of this kind. *Jacobs v. Seattle,* 171 Pac. (Wash.), 662; *Aylmore v. Seattle,* 171 Pac. (Wash.), 659; *U. S. v. Falls Mfg. Co.*, 112 U. S., 645. The only question in this respect, arising on the present record, is whether the plaintiffs' claim for compensation was filed with the board of aldermen of the defendant city within ninety days after the first substantial injury to their property. If so, they are entitled to have an issue of damages submitted to the jury; otherwise not.

For the error, as indicated, there must be a new trial, and it is so ordered.

New trial.

STATE OF NORTH CAROLINA EX REL. CORPORATION COMMISSION, AND THE SOUTHERN POWER COMPANY, PETITIONER, v. THE CANNON MANUFACTURING COMPANY ET AL., RESPONDENTS.

(Filed 21 February, 1923.)

1. Corporation Commission—Corporations—Rates of Charges—Tolls—Statutes.

Including public-service corporations furnishing its customers electricity for power, etc., the Corporation Commission is authorized by statute to fix just and reasonable rates or charges, and when these rates are so fixed, other or lower rates are to be deemed as unjust and unreasonable. C. S., 1035, 1066-7-8, 1083-90, 1097, 1100.

2. Appeal and Error—Judgments—Fragmentary Appeals—Dismissal—Corporation Commission.

An appeal lies under the provision of statute, from an order of the Corporation Commission fixing certain rates to be charged by a public-service corporation to its customers for furnishing them with electrical power, C. S., 1097-8, to the Superior Court, where the trial will be *de novo*, with the presumption that the rates so fixed by the Corporation Commission are prima facie just and reasonable, and from thence only will a further appeal lie to the Supreme Court, governed by the rule that it must not be fragmentary, but that it shall be from a final judgment or one final in its nature.

3. Same—Objections and Exceptions—Procedure.

Where the ruling of the Superior Court does not amount to a final judgment, or one final in its nature, the remedy of the party adversely affected is by exception, preserving his right until such appeal may be had from a final judgment.

4. Appeal and Error—Judgments—Parties—Jurisdiction—Fragmentary Appeal—Corporation Commission.

Where the customers of a public-service corporation are properly joined upon notice, and participate in the hearing before the Corporation Commission upon the question of whether the petitioning corporation should be allowed to raise its rates of charges for electrical power furnished them, on appeal to the Superior Court from the rates fixed by the commission as just and reasonable, the ruling as to the rates so fixed shall be regarded as single and entire, applying to all, and some of the users may not separate themselves from the others and appeal to the Supreme Court from an order overruling their exception for the lack of authority of the commission to make the rates, the appeal being fragmentary, and not from a final judgment or one in its nature final.

5. Appeal and Error—Fragmentary Appeal—Supreme Court—Opinions—Discretion.

The Supreme Court may dismiss an appeal as fragmentary and express its opinion on the merits upon matters duly presented of record, when it appears that the case is one of importance and an opinion is desirable as a guide to the parties in the further proceedings in the case.

6. Corporation Commission—Rates—Jurisdiction—Judgments—Orders.

When the Corporation Commission has finally established, under the provisions of the statute, rates to be charged by a public-service corpora-

tion for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusively bind all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard.

7. Corporation Commission — Corporations — Rates of Charges—Police Powers—Contracts—Constitutional Law.

The authority conferred upon the Corporation Commission to establish reasonable and just rates of charges by a public-service corporation for furnishing to its customers electrical power, come within the police powers of the State, and contracts previously made are subordinate to the public interest that such rates be reasonable and just, and afford the corporation supplying the service a safe return upon its investment, having proper regard to the public interest that plants of this character should be properly run and maintained.

8. Same—Commerce—Statutes.

While the generation of electricity in another State when transported to purchasers in this State may be regarded as interstate commerce, its distribution and sale here is local to the State, permitting the Corporation Commission to establish a just and reasonable rate of charges in conformity with the statutory powers, there being no interfering act of Congress relating to the subject. C. S., 1066.

9. Corporation Commission—Statutes—"Transportation"—Distribution—Statutes—Words and Phrases.

The word "traffic," used in our statute to confer upon the Corporation Commission the authority to establish just and reasonable rates of charges by certain public-service corporations, includes the transportation and also the sale and distribution of the commodities affected. C. S., 1066.

10. Corporation Commission—Corporations—Rates of Charges—Valuation of Plant—Evidence—Tax Valuation.

Under the provisions of our valid statute, C. S., 1068, the Corporation Commission, in fixing a reasonable and just rate of charges for public-service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the tax valuation of the plant: *Held*, under the facts of this case, an exception was untenable that the rate fixed was upon the basis of the tax valuation alone.

11. Corporation Commission — Rates of Charges — Orders—Judgments—Maximum and Minimum Rates.

Upon the principle that a finding of fact should be determined according to the law and evidence in the case, *it is held* herein that the word "maximum," used in the order of the Corporation Commission for fixing the rates of charges allowed to the petitioning public-service corporation, was not intended to mean that a descending rate therefrom was to be allowed under the contract set up by the customers or users, but to distinguish it from the word "minimum," which also was used in reference to the subject.

12. Corporation Commission—Findings—Judgments—Orders—Just Rates—Inferences—Unjust Rates.

Under our legislation pertinent and the facts presented by the record on this appeal, the finding by the Corporation Commission that the rates

designated by it are reasonable and just, includes a finding that all other rates are unreasonable and unjust.

CLARK, C. J., concurring; WALKER, J., did not sit in this case and took no part in the decision thereof.

APPEAL by respondents from *Bryson, J.*, at July Special Term, 1922, of CLEVELAND.

This is a petition filed by the Southern Power Company, petitioner, before the Corporation Commission, in November, 1920, for an increase of rates on electric power supplied by petitioner to its customers within the State, and on the alleged ground that the existent rates were insufficient to afford petitioner a reasonable return on a fair value of the property used in the generation, sale, and distribution of such electricity, and to enable the petitioners to supply and furnish efficient and adequate service to the members of the consuming public "demanding service from petitioner." The rate suggested as necessary being at 1.4 cents per kilowatt hour to an amount of 50,000 kilowatt hours per month for primary power, with a larger scale where a less amount of such power is taken, and a diminishing scale of prices where the quantity is greater. There was also a fixed sum requested for secondary at one cent per kilowatt hour for first 50,000 kilowatt hours per month, with an increasing and diminishing scale for smaller and larger quantities.

On the filing of the petition, the commission caused notices to be issued and served on all the customers of the petitioner within the State having contracts with the company for electric power, and also a copy of the petition filed by said company, the number of such customers being about 280. Of these customers some eighty or more appeared and objected to the proposed increase, and thirty or forty filed answers stating their objections in general terms, and setting forth, also, long-term contracts held by them with petitioner in which said company had contracted and agreed to supply the holders with electric power at rates greatly less than those proposed in the petition, both for primary and secondary power.

The commission held a full investigation of the case, the different hearings extending from November, 1920, to July, 1921, and during such proceedings it appears that both petitioners and respondents were represented by counsel, and all evidence relevant to the inquiry was duly considered, including the contracts set out and relied upon by respondents in bar of the proposed increase, this last position appearing not only from the presumption of correct findings on the part of the commission as expressly provided in the statute, but from a proper perusal of the record, which will disclose that these contracts set up by respondents were nowhere challenged or denied by the petitioner, and were discussed and treated throughout as being in evidence and relevant to the questions at issue in the cause.

At the close of the hearing, and after due consideration, the commission, on 8 July, 1921, entered their formal order, appearing in the record, and to be taken as part of this statement, in which they fixed and declared as reasonable and just rates to be charged by petitioner for electricity 1.25 cents per kilowatt hour for primary power for amount of 50,000 kilowatt hours per month, with an increasing or diminishing charge for less or greater amounts per month. And they, also, as shown in their order, fixed the reasonable and just charge for secondary power at one cent per kilowatt hour for 50,000 kilowatt hours per month, with an increasing and diminishing charge for a less or greater quantity, the amount so fixed upon being as shown, less than that asked for by petitioners, but greater than the amount agreed upon in the contracts set up and in part relied upon by the respondents.

On the filing of this order a large number of respondents acquiesced in the findings of the commission and determined to make no further protest against the rates fixed upon. Appeals to the Superior Court being taken by 23 or more of the respondents, constituting three groups of mills holding long-time contracts, and which may be designated as the Cannon group, the Johnston group, and the Cone group, this last consisting of the Proximity Manufacturing Company, the Belle View Manufacturing Company, and the Revolution Cotton Mills, and being the appellants in No. 480, said appeal was transferred for hearing to the Superior Court of Cleveland County, where at July Special Term, 1922, it was submitted and heard before Bryson, J., and a jury, on the following issue:

"Were the rates fixed and set forth in the several schedules contained in the order of the State Corporation Commission of 8 July, 1921, unjust and unreasonable to the consumers of such power and current?"

At or before the impaneling of the jury, the Cone group of mills, admitting that the rates fixed by the commission were reasonable and just, withdrew all exceptions to the issues and findings of fact, and moved to dismiss the appeal and proceedings for that the Corporation Commission was without jurisdiction or power in the premises:

1. Because this attempted regulation affected and concerned interstate commerce, and in such form and fashion that Congress alone could deal with it.

2. That our own statute, constituting the commission, restricted its powers of rate regulation to "intrastate traffic," and did not extend, therefore, to the rates in question here, as same, according to their position, concerned only "interstate commerce."

The motion was overruled, and this group of respondents excepted.

The Cannon group and the Johnston group, while joining in the motion to dismiss because the subject-matter was interstate commerce, insisted on their exceptions of fact, and introduced their evidence on the

issue, and same was submitted to the jury under a clear and comprehensive charge of the court. While the jury were considering of their verdict, counsel for these two groups moved further that the order of the commission be set aside and the proceedings be remanded with instructions, for errors of law apparent on the face of the record:

1. That on the admitted facts, and as a conclusion of law, the rates fixed by the commission would bring about an unlawful discrimination in favor of the holders of certain contracts for power at a lower rate existent in the State of South Carolina.

2. For errors in the basic principles of valuation under which the rates fixed upon were estimated.

These motions were disallowed, and respondents excepted.

The jury having failed to agree upon a verdict, a juror was withdrawn and a mistrial had, and the issue is now on the Superior Court docket undetermined. The Cone group of mills appealed to Supreme Court from the refusal of his Honor to allow their motion to dismiss for lack of jurisdiction, and his declining to sign a separate judgment to that effect, the court being of opinion that a separate right of appeal did not arise to these appellants. The Cannon group and Johnston group took an appeal from the order overruling their motion to dismiss and their motion to set aside the order of the commission and remand, with instructions, as heretofore stated.

The record further discloses that at the call of the cause for trial in the Superior Court, the Attorney-General, in behalf of the Corporation Commission, having obtained leave for the purpose, moved to dismiss the appeal of the respondents for that no right of appeal existed for any of the respondents on the facts presented. Motion was overruled, and the Attorney-General excepted.

The appeals of the respondents, appearing on the docket as two cases, were consolidated by consent, and argued, considered, and determined as one, presenting, however, the different interests of the parties as disclosed in the record.

On the hearing in this Court, there was motion by the power company, the petitioner, to dismiss the appeals as being fragmentary and premature.

E. T. Cansler, John M. Robinson, C. R. Hoey, O. Max Gardner, and W. S. O'B. Robinson, Jr., for Southern Power Company, petitioner.

Tillett & Guthrie, J. C. Biggs, A. G. Mangum, A. C. Jones, O. M. Mull, and D. Z. Newton for the Cannon Manufacturing Company et al.

R. R. King, S. M. Gattis and Parker & Long for the Cone group of mills.

HOKE, J., after making the preliminary statement: Our legislation more directly pertinent to this controversy, C. S., ch. 21, secs. 1035,

1066-67-68, 1083-1090, 1097-1098-1100 *et seq.*, confers upon the Corporation Commission power to make reasonable and just rates and charges to prevail as to intrastate traffic by certain designated public-service companies, including those engaged in furnishing electricity, electric-light current, power or gas, etc. The statute, more particularly in section 1066, considered in connection with sections 1083 and 1090 *et seq.*, clearly contemplates and provides that the exercise of this power in a given case shall be made upon notice and due inquiry, and in section 1067 it is declared: "That the rates or charges established by the commission shall be deemed just and reasonable, and any rate or charge made by any corporation, company, copartnership, or individual engaged in the business above specified, other than those so established, shall be deemed unjust and unreasonable." Section 1068 gives indication as to the method and basis of valuation to be recognized in fixing these rates, and in sections 1097-1098 provision is made for reviewing the action of the commission by appeal to the Superior Court, and in section 1100 the right of appeal is given to the Supreme Court from "the judgment of the Superior Court under the same rules and regulations as are prescribed by law for appeals, etc."

It has been heretofore recognized with us that the Southern Power Company, the petitioner, comes within the provisions of the law, *Public Service Co. v. Power Co.*, 179 N. C., 30; *Public Service Co. v. Power Co.*, 179 N. C., 330, and that the powers conferred by the statute extend in proper instances both to an increase and lowering of rates as the facts may appear, the position being stated in 179 N. C., 151-161; *In re Utilities Co.*, as follows: "Both from the language of the statute and its evident meaning and purpose, this power to fix rates that are just and reasonable extends to an increase as well as a lowering of rates, and in making a decision on these questions it is clearly contemplated and provided that the commission shall establish such rates and charges as will give to the owners a fair return on their investment and enable them to keep their property and equipment in condition to afford adequate, safe, and convenient service."

And in reference to the sections providing for and regulating appeals, our decisions hold that no appeal lies from the orders and rulings of the commission directly to the Supreme Court, but that any such appeal must be taken in the first instance to the Superior Court, and only from the judgments of the Superior Court will an appeal lie to this Court under the same rules and regulations as are prescribed by the general law appertaining to appeals. And that when such appeal is taken from the action of the commission on the controlling and determinative issue in the cause, the trial is to be *de novo*, a ruling fully recognized by the appellants in the present case, the record disclosing that in lodging their

appeal a trial *de novo* is demanded. Record, p. 1155; *Corporation Commission v. R. R.*, 137 N. C., 1; *Rhyne v. Lipscombe*, 122 N. C., 650; *Pate v. R. R.*, 122 N. C., 877; *S. v. R. R.*, 161 N. C., 270.

From this it follows that on appeal the decisions and rulings of the commission on the hearing are in no way controlling, and the judge, at the trial of the cause in the Superior Court, must submit the same to the jury under recognized and approved principles of law. It will be noted, also, that the statute as to appeals to this Court provides, as stated, "That such appeals may be taken from the judgment of the Superior Court under the same rules and regulations as prescribed by the general law." And it is the accepted principle controlling appeals under the general law that except when otherwise expressly provided by statute, they are only permissible from a final judgment, or one in its nature final. C. S., 638; *Cement Co. v. Phillips*, 182 N. C., 437; *Duffy v. Hartsfield*, 180 N. C., 151; *Barbee v. Penny*, 174 N. C., 571; *Gilbert v. Shingle Co.*, 167 N. C., 286; *Chadwick v. R. R.*, 161 N. C., 209; *School Trustees v. Hinton*, 156 N. C., 586; *Smith v. Miller*, 155 N. C., 242; *Pritchard v. Spring Co.*, 151 N. C., 249; *Cameron v. Bennett*, 110 N. C., 277. A ruling that prevails with us, even on a motion to dismiss for want of jurisdiction, where such motion is disallowed, the proper practice being to note an exception and proceed with the trial of the cause. Nor is the position affected because three of the respondents, referred to as the Cone group, and in like case with the others, have seen proper to admit that the rates established by the commission are reasonable and just, and seek to appeal from a refusal of the court to dismiss the proceedings for lack of jurisdiction or power in the commission to hear and determine the same.

This power to fix rates that are reasonable and just for public-service companies is conferred in the exercise of the police powers of the State. Having taken from these companies, or essentially modified their right of private contract, it is altogether just and proper that they should have such rates and charges fixed as will yield them, as stated, a fair return on their investment, and a sound public policy demands that the rates and charges should also enable them to keep their property and equipment, which they are held to have dedicated in part to public use, in a condition to afford adequate, safe, and convenient service. When properly established according to the statutory provisions, and after notice and due inquiry, they are coextensive with the State's jurisdiction and territory, and conclusively bind all companies, corporations, or persons who, being parties, have been afforded an opportunity to be heard, and are prima facie reasonable and just in all other cases coming within the scope and purview of the inquiry and findings, and it has been directly held that private contracts for a lower rate, though already

existent, be to this extent subordinated to the public weal. *In re Utilities Co.*, 179 N. C., 151-161, citing, among other cases, *The Union Dry Goods Co. v. Public Service Corporation,* 248 U. S., 372.

Speaking to the position, and the underlying reasons for it, the Court, in the case referred to, said: "Not only is the judgment of his Honor sustained by the principle more directly involved, but any other ruling in its practical application would likely and almost necessarily offend against the principle which forbids discrimination on the part of these companies towards patrons in like condition and circumstance. If a *quasi*-public company of this kind could evade or escape regulation establishing fixed rates that are found to be reasonable and just by making long-time contracts or other, this regulation might be made to operate in furtherance of the very evil it is in part designed to prevent."

The issue now pending in the Superior Court, involving as it does whether the rates established by the commission shall prevail for companies of this character, must be regarded as single, entire, and inclusive, and three of twenty-four or twenty-five respondents may not sever themselves from its effects and presently prosecute their appeal. If this were allowed and they fail in establishing their motion to dismiss, they could still have the benefits of the ultimate finding of the jury in the cause, in case the rates fixed by the commission are set aside. It appearing, therefore, that no final judgment of the Superior Court affecting the rights of these parties has been entered, and no such judgment can be so entered while this, the controlling issue, is pending and undetermined, their appeals, like the others, must be dismissed as fragmentary and premature.

There could be no better illustration of the wisdom of the rule disallowing fragmentary appeals than the instant case, where there are at least 274 persons and companies notified, and with the right to be heard, and seventy or eighty appeared. If three could sever their case from the dominant issue, others could do the like, and, as said in *Pritchard's case, supra,* "Each claimant considering himself aggrieved could bring his cause here for consideration, litigation of this character would be indefinitely prolonged, costs unduly enhanced, and the seemly and proper disposition of causes prevented."

While under our established rules of orderly procedure we must hold that these appeals be dismissed, we consider it proper to express our opinion on some of the principal exceptions appearing in the record, a course also approved by our decisions where the case is one of importance and an opinion is desirable as a guide to the parties in the further proceedings in the cause. *Cement Co. v. Phillips,* 182 N. C., 437; *Gilbert v. Shingle Co.*, 167 N. C., 286; *S. v. Wylde,* 110 N. C., 500; *Milling Co. v. Finlay,* 110 N. C., 411.

And first, on the motion to dismiss because the subject-matter of these rate regulations is interstate commerce, and both under the provisions of the Federal Constitution and the state statute under which the commission acted the same is not the subject of state regulation. While the transportation and sale of electric energy generated in one state and conveyed directly to purchasers in another is undoubtedly interstate commerce, which may be neither prohibited nor taxed, nor substantially burdened or interfered with by State regulations, as we understand the record, it is the permissible inference that 70 per cent of the power sold to consumers in this State is generated in South Carolina and brought into this State over the transmission lines of the company at a high tension of 80,000 or 100,000 volts, that mingled here with the other 30 per cent of this power, which last is generated in North Carolina, the entire amount at various substations here is "stepped down" or reduced to a commercial voltage and then sold to the consumers from the principal office of the company in the city of Charlotte, N. C., or at the homing place of the consumers in this State. From this statement, which, in our opinion, sufficiently appears from different portions of the record, both the product and the contracts concerning them being situate in this State, it would seem that the subject-matter of the controversy is strictly intrastate, and may not be subjected to Federal control or interference. But it is not now required to make definite ruling on this question, for on the facts as here presented Congress thus far has made no interfering regulations as to the transmission and sale of electricity between the states, and the authorities are at one in holding that though electric power or natural gas may be transported from one state to another, and though interstate commerce may be so far involved in its local sale and distribution that Congress could exert control to the extent required to prevent such commerce from being unduly burdened, in the absence of such action on the part of Congress the local sale and distribution of these products within the several states may be subjected to state regulation in the reasonable exercise of the police power. *Pennsylvania Gas Co. v. Public Service Co.,* 252 U. S., 23; *Public Utilities Co. v. Landon,* 249 U. S., 236; *In re Pa. Gas Co.,* 225 N. Y., 397; *The Minnesota Rate Cases,* 230 U. S., 352-402; *Robbins v. Shelby Tax District,* 120 U. S., 489-492; *Mill Creek Coal & Coke Co. v. Public Service Co.,* 84 West Va., 662; *Mfrs. Light and Heat Co. v. Ott,* 215 Fed., 940.

In the *Minnesota Rate Case, supra,* a case involving the right of intrastate railroad rate regulation, *Associate Justice Hughes* states the position as follows: "But within these limitations there necessarily remains to the states, until Congress acts, a wide range for the permissible exercise of power appropriate to their territorial jurisdiction

although interstate commerce may be affected. It extends to those matters of a local nature as to which it is impossible to derive from the constitutional grant an intention that they should go uncontrolled pending Federal intervention. Thus, there are certain subjects having the most obvious and direct relation to interstate commerce, which, nevertheless, with the acquiescence of Congress, have been controlled by state legislation from the foundation of the Government because of the necessity that they should not remain unregulated, and that their regulation should be adapted to varying local exigencies; hence, the absence of regulation by Congress in such matters has not imported that there should be no restriction, but rather that the states should continue to supply the needed rules until Congress should decide to supersede them. Further, it is competent for a state to govern its internal commerce, to provide local improvements, to create and regulate local facilities, to adopt protective measures of a reasonable character in the interest of the health, safety, morals, and welfare of its people, although interstate commerce may incidentally or indirectly be involved."

In *Pa. Gas Co. v. Public Service Co., supra*, a case involving the right of State regulation of the sale and distribution of natural gas, transported by pipe lines from the State of Pennsylvania into the State of New York, *Associate Justice Day*, in the opinion of the Court upholding the right, said: "The thing which the State Commission has undertaken to regulate, while part of an interstate transmission, is local in its nature, and pertains to the furnishing of natural gas to local consumers within the city of Jamestown, in the State of New York. . . . This local service is not of that character which requires general and uniform regulation of rates by congressional action, and which has always been held beyond the power of the states, although Congress has not legislated upon the subject. While the manner in which the business is conducted is part of interstate commerce, its regulation in the distribution of gas to the local consumers is required in the public interest, and has not been attempted under the superior authority of Congress."

This opinion is in affirmance of a like decision of the same case by the Court of Appeals of New York, and in which *Associate Justice Cardoza* said in part: "We deal here with a different situation. There is here no regulation of transportation. *Mfrs. Light and Heat Co. v. Ott,* 215 Fed., 940, 944. There is no regulation of a duty owing equally to two states. There is regulation of a duty owing to one of them alone. The seller of most things has the right to sell at whatever price he will. This petitioner has lost that right by the acceptance of a public franchise in consideration of a public service. *Gibbs v. Baltimore Gas Co., supra; New Orleans Gas Co. v. Louisiana Light Co.,* 115 U. S., 650; 6 Sup. Ct., 252; 29 L. Ed., 516; *Shepard v. Milwaukee Gas Co.,* 6 Wis., 539; 70

Am. Dec., 479. The service is due to the state from which the privilege proceeds. Until Congress shall intervene, it is therefore the police power of New York that controls the sale of gas to consumers in New York. There is no division of the power between New York and Pennsylvania. There is no more a division of power than when we regulate our fees for wharfage or our tolls for artificial waterways. In these matters, protection of our own inhabitants is a duty that is ours and no one else's. The power may be displaced; but, until displaced, it is undivided. Here, then, is the decisive distinction between the regulation of the price of gas and that of rates of transportation. There is no room for conflict of authority, for clashing regulations. The statute has a sphere of operation that is not national, but local. *Cooley v. Bd. of Port Wardens, supra.* It is idle to speak of the need of uniformity of action by states of equal competence when there is only one state whose action is involved. But even within the state, diversity rather than uniformity is exacted by the conditions of the business. Rates adequate in one city are inadequate in another. The local needs are best known to local agencies of government. No central authority, acting for the Nation as a whole, will readily discern them.

"The case comes, then, to this: We have a sale of a single commodity. We have a preëxisting duty to sell it at fair rates. We have a transaction where conflicting regulations by the states are impossible, for the public duties regulated are fulfilled in one state only. We have a statute which declares a duty that would exist without it, and establishes a new agency of government to insure obedience. The silence of Congress cannot be interpreted as a declaration that public-service corporations, serving the needs of the locality, may charge anything they please. *County of Mobile v. Kimball, supra; Transportation Co. v. Parkersburg, supra; Covington Bridge Case, supra,* 154 U. S., 222; 14 Sup. Ct., 1087; 38 L. Ed., 962. The local regulation stands until Congress occupies the field."

In *Mill Creek Coal and Coke Co. v. Public Service Commission, supra,* determining the right of state regulation of sale and distribution of electric energy in the State of West Virginia, transmitted from the State of Virginia, *Associate Justice Lynch* said: "But though interstate commerce is involved, the state is not necessarily deprived of the right to regulate and supervise under its police power. That which is attempted here is the regulation of the rates at which electric power, produced in Virginia, shall be sold in West Virginia. It is settled law that the police power of the state embraces regulations designed to promote the public convenience or the general welfare or prosperity, as well as those in the interest of the public health, morals, and safety. *Lake Shore and M. S. R. Co. v. Ohio,* 173 U. S., 285, 292; 43 L. Ed.,

702, 704; 19 Sup. Ct. Rep., 465; *Chicago, B. and Q. R. Co. v. Illinois*, 200 U. S., 561, 562; 50 L. Ed., 596, 609; 26 Sup. Ct. Rep., 341; 4 Ann. Cas., 1175; *Bacon v. Walker*, 204 U. S., 311, 317; 51 L. Ed., 499, 502; 27 Sup. Ct. Rep., 289; *Chicago and A. R. Co. v. Transbarger*, 238 U. S., 67, 77; 59 L. Ed., 1204, 1211; 35 Sup. Ct. Rep., 678. And it is clear that the regulation of the rates of public utilities is for the public convenience and general welfare, and hence a proper exercise of the police power of the State. *Benwood v. Public Service Commission*, 75 W. Va., 127; L. R. A., 1915 C, 261; 83 S. E., 295; *Virginia-Western Power Co. v. Com.*, ... Va., ...; A. L. R.; P. U. R., 1919 E, 766; 99 S. E., 723. See, also, *German Alliance Ins. Co. v. Lewis*, 233 U. S., 389; 58 L. Ed., 1011; L. R. A., 1915 C, 1189; 34 Sup. Ct. Rep., 612."

"In fixing the rate of sale, however, as distinguished from rates of transportation, the duty regulated is of an entirely different nature. The duty of the power company to sell at reasonable rates was one owed both to citizens of Virginia and to the public in this state. But the two duties do not overlap, as they do where rates of transportation are concerned. The price at which a commodity is sold is essentially local, affecting chiefly those in the community where it is made, and only incidentally, if at all, touching those outside of the community."

And in *Mfrs. Light and Heat Co. v. Ott*, 215 Fed., *supra*, *Judge Woods* said: "But this interflow of gas from one state to another, according to the pressure from the main gas pipes as common reservoirs, cannot affect the power of the State of West Virginia to make reasonable regulations as to rates for gas furnished to its own citizens. *West v. Kansas Gas Co.*, 221 U. S., 229; 31 Sup. Ct., 564; 55 L. Ed., 716; 35 L. R. A. (N. S.), 1193, relied on by complainants, has no application, for in the present case no effort is made to prevent the transportation and sale of natural gas from West Virginia into other states. It is not necessary to decide whether the Congress may not regulate charges for natural gas under such conditions, and under the well known rule the Court should not anticipate that question. In the present state of the law, the Congress having taken no action, it was clearly within the power of the state legislature to provide for the protection of its own citizens against excessive charges. If it be assumed that interstate commerce will be incidentally affected, yet the regulation of the local charges of a natural gas company as a public-service corporation is within the police power of the state until the Congress sees fit to act."

From a proper consideration of these citations and the principles they approve and illustrate, it appears that the sale and distribution of electric power within a given state is a matter that primarily concerns the internal affairs of such state, and though it may become the subject of Federal regulation in so far as interstate commerce is involved and

to the extent required for its protection, its sale and distribution is local in its character and comes clearly within our State statute, C. S., 1066, conferring upon the State Corporation Commission the power to make reasonable and just rates and charges for "intrastate traffic," the term "traffic" being broad enough to include both transportation as well as sale and distribution, and it is clearly in the last sense that the term is used in the statute as applied to "persons, companies, or corporations furnishing electricity." Neither in the commerce clause of the Federal Constitution, therefore, nor in the State statute, can there be found any valid objection to the power of the State Corporation Commission to deal with this subject, and the exception to that effect has been properly overruled.

Appellants except further that to uphold the rates as established by the commission would work an unlawful discrimination against the consumers of electric power in this State, and it is moved, among other things, to set aside the rates and remand with instructions to establish rates as low as any enforceable contract voluntarily made by the petitioning company, the position being that certain existent contracts in the State of South Carolina and enforceable there are much lower than those fixed upon here. We do not think that a proper consideration of the record will disclose that any unlawful discrimination of a substantial kind and amount would necessarily and as a conclusion of law result by reason of the South Carolina contracts referred to. There is evidence to the effect that the apparent difference in prices in the great bulk of the South Carolina contracts is because the mills in that State, as units, are much larger consumers of power than here, and can, therefore, and on that account, purchase the current at a lesser rate, and otherwise we do not discover in the record any evidence that a contract in South Carolina at a lower rate, voluntarily made by the power company, is in like condition and circumstance with those in this State, and which are the subject-matter of these regulations. Apart from this, however, the Corporation Commission in this State is empowered and directed to make reasonable and just rates as applied to the distribution and sale of power in this State and not otherwise, and such power cannot be directly controlled or weakened by conditions existent in other states, either from the action or nonaction of official bodies there, or the dealings between private parties. To hold otherwise would, in its practical operation, be to withdraw or nullify the powers that the statute professes to confer and should not for a moment be entertained. Nor is the position approved by any well considered authority. *Port Richmond & Bergen Point Ferry Co. v. Board of Chosen Freeholders,* 234 U. S., 317; *Hudson County v. State,* 24 N. J. L., 718; *In re Pa. Gas Co.,* 225 N. Y., 397; *In re Atchinson T. S. F. R. Co.,* Public Re., 1918 A, 843; *In re Ashton*

et al. v. Potter Gas Co., 1922 B, 542; *In re Ga. R. R. v. Power Co.*, 1921 A, 165; *Stark Co. v. Public Utilities Commission*, 131 N. E., 157.

Doubtless if it should be made to appear that a power company or manufacturer and seller of electricity in an adjoining or other competitive state is presently and voluntarily making contracts at a substantially lower rate than here, our Corporation Commission, in the proper discharge of its duties, could well decide that such conditions might fully justify it in establishing such contract rates "as reasonable and just," but no such facts are presented in this record. On the contrary, the evidence is to the effect that, while there are some older contracts existent in South Carolina at a lower rate, made at a time when the value of this power was not known or fully appreciated by consumers, and when the company was endeavoring to introduce the power and had not itself ascertained a fair basis or rate of charge, no contracts were now being made at any such rates; but, on the contrary, all contracts of recent date are at or near the rates fixed upon in this State to consumers in like condition and circumstance. From the facts appearing in this record, the danger of unlawful discrimination does not lie in some old contracts in South Carolina indefinitely referred to and described as having been made at the inception of this business, but in the numerous contracts now existent in favor of these appellants, and which, if allowed to continue in spite of the action of the commission establishing just and reasonable rates for all purchasers of power in like condition and circumstance will assuredly work a discrimination in their favor of the most far reaching and injurious kind. As said in the *Public Utilities Co. case*, 179 N. C., at p. 161: "If a *quasi*-public company of this kind could evade or escape regulations establishing fixed rates that are found to be reasonable and just by making long-time contracts or other, this regulation would be made to operate in furtherance of the very evil it is in part designed to prevent." The exception has been properly overruled.

Again exception appears to the methods and basis of valuation adopted by the commission for the rates as fixed upon. Under this exception appellants object that the commission has considered the tax values of the company's properties or made the same the basis of their estimate. If they had done this there would seem to have come no harm to appellants, for it is near the same rate as that fixed upon or lower, but the complete answer to this objection is that, as we understand the record, the commission did not make the tax value the basis of their rates and the exception on that ground is untenable.

It is further objected that the commission, as a part of their estimate, heard evidence as to the value of petitioner's business as a "going concern." If the commission had done this it would seem to be a correct

ruling for rate-making purposes, or, in any event, the evidence is pertinent and proper in determining such rate, though it has been disapproved on the question of whether a given rate is confiscatory, *Galveston Electric Co. v. City of Galveston,* U. S. Supreme Court Advance Opinions, No. 13, p. 382, but the objection is without support as a matter of fact, for the record shows, as we recall it, that while evidence was heard by the commission as to the "going concern value," it declined or failed to allow any such value for the reason that the pertinent facts offered did not afford any reliable or sufficient data for estimating the value. From a perusal of the record, the commission, in adopting a basic value for rate-making purposes, have clearly followed the directions of the State statute under which they were acting, C. S., 1068, to wit, a fair estimate and valuation of the property presently used in generating and supplying the current sold to consumers, and to be ascertained under the provisions of the statute, as follows:

"*How Maximum Rates Fixed.* In fixing any maximum rate or charge, or tariff of rates or charges for any common carrier, person, or corporation subject to the provisions of this chapter, the commission shall take into consideration, if proved, or may require proof of, the value of the property of such carrier, person, or corporation used for the public in the consideration of such rate or charge, or the fair value of the service rendered in determining the value of the property so being used for the convenience of the public. It shall furthermore consider the original cost of the construction thereof and the amount expended in permanent improvements thereon, and the present compared with the original cost of construction of all its property within the State; the probable earning capacity of such property under the particular rates proposed and the sum required to meet the operating expenses of such carrier, person, or corporation, and all other facts that will enable them to determine what are reasonable and just rates, charges, and tariffs."

The statute, in our opinion, and as applied by the commission, is in substantial compliance with the basis and methods of estimate for rate-making purposes upheld in the decisions of the Supreme Court of the United States for interstate commerce. Such rule has been set forth in *Smyth v. Ames,* 169 U. S., 466-468, as follows:

"The basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the fair value of the property being used by it for the convenience of the public; and in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute,

and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. What the company is entitled to ask is a fair return upon the value of that which it employs for the public convenience; and, on the other hand, what the public is entitled to demand is that no more be exacted from it for the use of a public highway than the services rendered by it are reasonably worth."

A principle of valuation approved in the *Minnesota Rate Cases*, 230 U. S., 352-434; *San Diego Land and Town Co. v. National City*, 174 U. S., 739, and other authoritative cases on the subject. We find, therefore, no valid legal objection to the basis of valuation adopted by the commission, and this exception, also, was properly overruled.

On the argument we were cited by counsel for appellants to the recent decision of the Supreme Court of the United States, *Wichita R. R. and Light Co. v. Public Utilities Commission of the State of Kansas*, as authority against the validity of the proceedings below. Vol. 43, Supreme Court Reporter, No. 3, p. 51, 15 December, 1922. In that case it appeared, among other things, that: "The Wichita Railroad and Light Company, a corporation of West Virginia, is an electric street railroad and light-furnishing company, doing business in Wichita, Kan., and will be known as the Wichita Company. The Kansas Gas and Electric Company, also a West Virginia corporation, and to be known as the Kansas Company, is engaged in the business of furnishing electrical light and power to consumers in Kansas. In 1910 the two companies made a contract by which the Kansas Company agreed to furnish, and the Wichita Company agreed to accept and pay for, electrical energy at certain rates until 1930, and the contract was fulfilled by both until 1918."

The Kansas Company thereupon filed a petition for an increase of rates on the alleged ground that under existent conditions and prices, such increase was required to afford a fair return on their investment, and to enable them to afford adequate service, etc. The increase was allowed after a hearing, but without notice to the Wichita Company, or, so far as appears, to any others in like case. The Kansas Commission threatening to put in force the increased rates allowed by it, the Wichita Company filed a bill in equity in the District Court of the United States against the Utilities Commission to restrain the proposed action, in which suit the Kansas Company became a party. The District Court gave judgment for the Wichita Company on the pleadings and enjoined the commission and Kansas Company as prayed. The Circuit Court of Appeals reversed the action of the District Court and directed a dismissal of the bill, and the Wichita Company appealed. In reversing the judgment of the Circuit Court of Appeals and affirming that of the District

Court, the opinion of the Supreme Court of the United States was made to rest on the ground that there had been no finding by the commission as required by the state statute, and after notice and due inquiry that the contract rate was unreasonable and unjust, and therefore the action of the commission was void on its face and should be so considered and dealt with. In our view, this decision gives no support to appellant's position on the facts of this record, for here it appears that there was notice and full inquiry into all the facts pertinent to the inquiry, including the contracts for lower rates held by the respondents, and our statute, as we have seen, unlike that in Kansas (C. S., 1067), provides in express terms: "That the rates and charges established by the commission shall be deemed just and reasonable, and any rate or charge made by any corporation, company, copartnership, or individual engaged in the business enumerated other than those established shall be deemed unreasonable and unjust."

It is the accepted principle here that a verdict or finding of fact shall be interpreted according to the evidence and the law applicable, *Reynolds v. Express Co.,* 172 N. C., 487, and the significance of this finding that the specified rates as adopted as the reasonable maximum rate to be charged from and after 1 August, 1921 (Record, p. 1014), construed in reference to the statutory provision, amounts to a finding that any lower rates, by contract or other, are unreasonable and unjust. It may be noted, also, that the term maximum is not intended to mean that there is a descending scale of rates subject to contract, but the same is no doubt used as distinguished from the term "minimum," also used in the report to designate the lowest amount of power the consumer may use and pay for under his contract.

Nor can the motion of the Attorney-General to dismiss the appeal be allowed, such motion being insisted on because no right of appeal arose to respondents. The statute is very broad in its terms, giving an appeal "from all decisions or determinations of the commission to any party affected by the order." This should undoubtedly be held to extend to any person made a party whose pecuniary or proprietary interests are adversely affected. The question has been directly resolved against the position in *In re Utilities Co.,* 179 N. C., 151.

For the reasons heretofore stated, the appeal of the respondents is dismissed as being fragmentary and premature, and the parties will proceed with the hearing of the issue as they may be advised.

Appeal dismissed.

WALKER, J., did not sit in this case, and took no part in the decision thereof.

CLARK, C. J., concurring: When it was laid down by the Supreme Court of the United States in the "*Slaughter House Cases,*" and cases

based thereon, that the states had the fullest right to supervise the operation of corporations and regulate their rates, charges, and conduct, it made a great change in the conception of the powers of the Government and the subordination of corporations to control. The case now before the Court is second in importance probably to none that has come before us, for it recognizes to the fullest extent the power and the duty of the State to regulate and control the conduct and the charges of water-power companies as fully as this has been applied to railroad companies and others. In some respects it is even, if possible, more important to regulate the charges of these companies and their conduct than that of the railroad companies or any others.

In view of the fact that the coal mines will be exhausted in comparatively a few years, it is of the utmost importance that the powers and rights and the extent of the Government control of substitutes for coal power shall be fully and explicitly stated.

1. If this were not done, it would be in the power of great corporations of this kind, by consolidation or joint action, to engross the entire supply of electricity derived from water power, and by discrimination in rates, absorb and take over the entire cotton-mill industry, and, indeed, ultimately, all the railroads and all other industrial plants.

2. Already it has come to universal knowledge that water-power companies, exercising in lieu and in the stead of the sovereign the power of eminent domain, are taking possession of the homes, the fields, and the ancestral holdings of the people along the rivers and creeks and the valleys at will for impounding water thereon for their own purposes. If this can be done without limit, they will possess a power greater than any king, and will arouse by arbitrary action an intensity of feeling which this country has not yet seen. It is absolutely necessary that the full power of the State and the Government be exercised so that the condemnation for these purposes by gigantic combinations of wealth shall not be arbitrary, and that the humblest owner of a home shall not be evicted in any case because he is unable to cope with the ruthless power of unlimited wealth. Already in California and South Dakota the limitation set is that the State is, and must continue to be, the sole owner of all water power, the operation of which to be not only under the regulation but under lease from the State.

3. A further consideration is that with the steadily growing demand of the Federal Government and of the State for greater revenues, and that in this State by the elimination by statute of the *ad valorem* tax on the money "invested in stocks and bonds" which the Constitution requires, Const., Art. V, sec. 3, and the impossibility of deriving more revenue from an *ad valorem* tax upon other property already so heavily burdened, it is absolutely necessary that there shall be new sources of revenue.

In a recent unanimous decision by the United States Supreme Court in *Heisler v. Colliery Co.*, filed 27 November, 1922, it was held that the Pennsylvania statute was constitutional which laid a tax of 1½ per cent on the value of all anthracite coal at the mine ready for shipment.

In Alabama there is a tonnage tax of 2 cents a ton on coal.

In Louisiana there is a "severance" tax of 2 per cent on the value of all timbers cut and minerals mined, from which the state derives two million dollars yearly.

In Minnesota there is an "occupation" tax of 6 per cent on the value of all ores mined which bring into the state treasury about two millions a year.

In Texas there is a "gross production" tax of 1½ per cent on all petroleum produced, which yields that state about five million a year.

In Oklahoma there is a "gross production" tax of one-half of one per cent on ores and three per cent on oil and gas, which brings into the treasury of that state eight million dollars a year. All the above forms of taxation are validated by the decision in the *Heisler case, supra.*

These taxes go far to assert that the coal and oil which are placed in the ground by Nature are not susceptible of private ownership except by public forbearance, and that in fact they are the property of the whole people, operated in private hands upon a small rent in the nature of a tax. But at any rate the assertion of this power over them opens up a new source of revenue to the state which can thus be drawn from the same source from which so many gigantic fortunes have been built—vast sums which might have gone into the public treasuries. The tax now laid on these indicate that the extent of the control of these properties and public utilities rests with the public and not with those who exploit these vast sources of revenue.

For a greater and a stronger reason, the streams, whether large or small, which are created by the showers which come down from on high, and which when they become navigable can become the property of no individual or corporation, but belong solely to the public to be operated under its control, these streams when they are smaller are equally the property of the whole people. The power generated from them and the extent to which those who appropriate them can impound the waters and cover against the will of the owners the homes and homesteads of the people is a matter of overwhelming public importance. The power to stay the will of those who would cover the surface with impounded water and use the electricity generated from this source which comes from the skies should be absolutely controlled by statute and regulated by the representatives of the people. At present there must be asserted at least a strict limitation upon the extent to which the exercise of the power of eminent domain by these corporations over private property shall be

permitted, and there must be the strictest control which shall prevent any discrimination by them in rates and all excessive charges. Besides, the decisions are uniform that no state can confer the right of eminent domain upon a corporation incorporated by another state. 20 Corpus Juris, 542; 10 R. C. L., 197, note 18; *Staton v. R. R.*, 144 N. C., 145; *R. R. v. Spencer,* 166 N. C., 522; *Brown v. Jackson,* 179 N. C., 365.

Beyond and above limitation by law as to all profits to individuals and to corporations, there must be the strict guardianship by the State outlined by statute, and in force by judicial and administrative officials, to protect for public use the bounty of heaven, whether folded in the recesses of the earth laid up from countless ages for the benefit of future generations of men, or created by the waters falling from the skies from which power is made for the necessities of men.

In this case, the inevitable and ultimate result of combination is not presented, nor the fact that small revenue is as yet derived by the State from this source, but we have before us the absolute necessity of restriction upon the gains that the owners of such property shall be permitted to receive, and of a denial of their right to discriminate which would inevitably bring all industrial plants and corporations into the control of some consolidated trust based upon the unified ownership of such motive power.

On the question of evidence, it would seem clear that in determining the reasonableness of the rate to be fixed in this case by the jury they may consider the rates charged by this defendant to other like consumers in the State of South Carolina under the same or substantially similar conditions. Such evidence is not controlling, but the jury have the right to consider it in passing upon the question whether the rates claimed by the plaintiff are reasonable.

STATE EX REL. CORPORATION COMMISSION AND THE SOUTHERN POWER COMPANY v. PROXIMITY MILLS ET AL.

(Filed 21 February, 1923.)

PER CURIAM. This appeal was consolidated by consent with *Corporation Commission v. Mfg. Co., ante,* 17, and heard and determined with that case. For reasons there stated, this appeal also is dismissed.

Appeal dismissed.

WALKER, J., did not sit in this case, and took no part in the decision thereof.

D. C. BURGER v. JOHN A. TATHAM ET AL.
T. C. CRISP ET AL. v. D. C. BURGER ET AL.

(Filed 21 February, 1923.)

Appeal and Error — Judgment Vacated — Reference — Pleadings—Procedure.

Held, an order by the Superior Court judge holding, upon the facts stated, that the plaintiff could not recover the purchase price of lumber, the subject of the action, but damages alone, and rereferring the case, permitting amendments to the pleadings, was too drastic and should be vacated; and the cause is remanded to the end that the exceptions filed to the referee's report may be passed upon according to the usual course and practice of the court in such cases, without regard to said order.

APPEAL by plaintiff D. C. Burger from *Brock, J.*, at April Term, 1922, of CHEROKEE.

Civil action to recover the purchase price of certain lumber alleged to have been manufactured and delivered under a logging and sawmilling contract.

The plaintiff D. C. Burger appealed.

D. Witherspoon and Dillard & Hill for plaintiff.
Moody & Moody for defendants.

STACY, J. The record in these consolidated cases is not in shape for us to determine the rights of the parties. At the November Term, 1921, by consent, the two causes were consolidated and referred to J. D. Mallonee, Esq., as referee, under the law appertaining to references. The referee made his report, to which both sides filed exceptions. At the Spring Term, 1922, his Honor, Walter E. Brock, judge presiding, without passing upon all of the exceptions to the referee's report, held that the plaintiff could not sue for the purchase price of the lumber, but that he could proceed only in an action for damages. Thereupon, the parties were given an opportunity to recast their pleadings, and the cause was remanded to the referee for further hearing. The plaintiff contends that this order is tantamount to a judgment as of nonsuit upon his original cause of action, as alleged, and that he is unable to proceed without serious injury to his rights. As now advised, we think the order in question is too drastic, and that it should be vacated. The cause will be remanded, to the end that the exceptions filed to the referee's report may be passed upon according to the usual course and practice in such cases, without regard to the order entered at the Spring Term, 1922.

Remanded with instructions.

E. H. ROBERSON AND WIFE, REBECCA ROBERSON, v. W. O. GRIFFIN.

(Filed 21 February, 1923.)

Estates—Heirs—Fee Simple—Husband and Wife—Entirety—Right of Survivorship—Deeds and Conveyances.

An estate to a husband and wife for life, and at their death to their heirs: *Held*, the word "heirs" was used in its technical sense as heirs general, and not to mean children, carrying the estate in entirety to the husband and wife, under the rule in *Shelley's case;* and under the principle of the right of survivorship, still effective under our law in such cases, the husband after the death of his wife would take the fee simple, and could make a valid conveyance of the same.

APPEAL by plaintiffs from *Kerr, J.*, in chambers at Nashville, 1 February, 1923, from MARTIN.

Controversy without action, submitted on an agreed statement of facts.

Plaintiffs, being under contract to convey certain land to the defendant, executed and tendered a deed therefor and demanded payment of the purchase price as agreed. The defendant declined to accept the deed and refused to make payment, claiming that the title offered was defective.

Upon the facts agreed, the court, being of opinion that the deed tendered was insufficient to convey a good and indefeasible title, gave judgment for the defendant; whereupon the plaintiffs excepted and appealed.

Dunning, Moore & Horton for plaintiffs.
No counsel for defendant.

STACY, J. On the hearing, the title offered was properly made to depend upon the construction of the following clauses in the deed from Asa T. Peel to E. H. Roberson and wife, Laura M. O. Roberson, under which plaintiffs acquired title to the *locus in quo:*

"That the said Asa T. Peel, in consideration of natural love and affection for his niece and her husband, E. H. Roberson, and for his services for me in caring for me for a number of years past, and so long as I shall live as hereby acknowledged, has bargained and sold, and by these presents does bargain, sell, and convey to said E. H. Roberson and wife, Laura M. O. Roberson, a life estate in, and at their death to their heirs all the right, title, and interest in the lots of land herein described, excepting my life estate in the same; described and bounded as follows:"

Description not in dispute.

"To have and to hold the said three tracts of land above described, and all privileges and appurtenances thereunto belonging to the said E. H. Roberson and wife, Laura M. O. Roberson, for their natural lives

and after the death of both of them to their heirs and assigns to their only use and behoof forever, upon the special condition that my life estate is herein reserved."

The case states that Laura M. O. Roberson died on 14 October, 1918, since which time the plaintiff, E. H. Roberson, has married again, his present wife being named Rebecca Roberson, and she is a plaintiff herein. Laura M. O. Roberson is survived by seven children, two of age and five still minors.

The one serious question presented for our consideration is whether the deed of Asa T. Peel to E. H. Roberson and wife, Laura M. O. Roberson, conveyed merely a life estate by the entirety to the grantees, or whether they took a joint estate in fee simple under the rule in *Shelley's case.*

It is contended by the defendant that the life estate being given to a husband and his wife and the remainder "after the death of both of them to their heirs," takes the case out of the operation of the rule, because, it is alleged, the word heirs is not here used in its proper technical sense. The basis of this argument is that "their heirs" must be the heirs of both, and that nobody can be the heirs of both except the children of both. Hence, it is contended that the word "heirs" in this deed is equivalent to children, and that therefore it is not a word of limitation, but a word of purchase. *May v. Lewis,* 132 N. C., 115. We think the law has been declared otherwise, in principle at least, in *Cotten v. Moseley,* 159 N. C., 1, and *Walker v. Taylor,* 144 N. C., 175. See, also, note, 29 L. R. A. (N. S.), 995.

In *Auman v. Auman,* 21 Pa., 343, a case practically on all-fours with the one at bar, it was held that a conveyance of land to A. and his wife for and during the term of their natural lives, or during the life of the survivor, and "after the decease of the said A. and wife, unto the lawful heirs of them, the said A. and wife, in fee simple," gives to the first takers a joint estate in fee. It was further held that the whole estate went to the survivor, and a conveyance by the wife after the death of the husband gave the grantee an estate in fee simple. Under this decision, the principles of which we think are applicable to the instant case, it follows that E. H. Roberson, upon the death of his wife, Laura M. O. Roberson, became the absolute owner in fee of the property sought to be conveyed. The contrary holding below will be reversed, and judgment will be entered for the plaintiffs.

Reversed.

FREDERICK H. ZIEGLER AND CLAUD L. ZIEGLER v. W. T. LOVE, JR., AND D. M. LOVE.

(Filed 21 February, 1923.)

1. Estates—Remainders—Contingencies—Vested Interests.

Estates, whether vested or contingent, are considered with regard to their certainty and to the time they may be enjoyed; and when there is an immediate fixed right of present or future enjoyment an estate is vested, *i. e.*, vested in possession where the right of present enjoyment exists, and in interest where there is a present right of future enjoyment; and a remainder is vested when the estate is definitely fixed so as to remain to a determinate person after the particular estate is spent, the distinguishing characteristic being the present capacity to take effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines.

2. Estates—Devises—Testator's Son and Children—Tenants in Common.

Whether vested or contingent, under a devise to the testator's son and to his children or issue, such son and his children or issue take such interest in the testator's estate as they acquire, as tenants in common.

3. Estates—Remainders—Devise—Vested Interests.

A vested remainder passes from the grantor at the time of the creation of the particular estate and vests in the grantee during the continuance of such estate or at the instant of its determination.

4. Same—Contingencies—Fee Tail—Statutes—Fee Simple.

An estate was devised to the testator's wife for life and at her death to one of his sons and his children or issue, but in case he should die childless and without issue, to the testator's heirs in equal degree. There survived at the death of the testator his son designated to take in remainder, who had no child or children for several years after the testator's death, and also several of the testator's children answering the designation of his heirs in equal degree: *Held*, the son designated to take in remainder acquired an estate in fee simple in remainder defeasible upon the happening of the contingency of his dying childless or without issue, which will continue to affect his interest until the estate becomes absolute or the event occurs by which it is to be determined, which event is to be referred to the death of the remainderman, and not to the death of the devisor.

5. Same—Remainders—Statutes.

An estate in remainder to the testator's son "and to his children or issue," there being no child or children of the son until long after the testator's death: *Held*, to create an estate tail at common law, which is converted into a fee-simple by our statute, C. S., 1734; and where there is an ultimate limitation over to persons coming within its terms, the testator's son and his child or issue cannot convey a fee-simple title.

APPEAL by plaintiffs from *Kerr, J.*, at November Term, 1922, of PASQUOTANK.

Controversy without action.

Thompson & Wilson for plaintiffs.
J. B. Leigh for defendants.

ADAMS, J. John H. Ziegler died on 15 February, 1889, leaving a will containing the following clause: "My lot of land where I reside in Elizabeth City, together with all the improvements and outhouses upon it, including the shop, I give to my wife for and during the period of her life or widowhood, and at her marriage or death I give the same to my son, Frederick H., and to his children or issue, but in case he should die childless and without issue, then I give the said place and improvements to my heirs in equal degree in fee simple."

The plaintiffs are the devisee, Frederick H. Ziegler, and his son Claud, who was born on 11 March, 1891. Besides Frederick, several children of the devisor survived his widow, whose death occurred on 5 December, 1901. The plaintiffs, claiming to own the entire fee after the death of the widow, made a contract to convey the lot to the defendants at an agreed price. The plaintiffs are ready and willing to execute a deed therefor, but the defendants have refused to accept such deed on the ground that the plaintiffs cannot convey an indefeasible title in fee.

His Honor adjudged that the plaintiffs are not the owners in fee simple absolute, and therefore cannot convey an unencumbered title in fee. The plaintiffs excepted and appealed.

Estates considered with regard to their certainty and to the time when they may be enjoyed are distinguished as vested and contingent. When there is an immediate fixed right of present or future enjoyment an estate is vested—vested in possession when there exists a right of present enjoyment, and vested in interest when there is a present right of future enjoyment. A remainder is vested when the estate is definitely fixed so as to remain to a determinate person after the particular estate is spent (2 Blk., 168), or as defined by Fearne: "A remainder is vested whenever the preceding estate is limited so as to determine on an event which certainly must happen, and the remainder is so limited to a person *in esse* and ascertained that the preceding estate may be, by any means, determined before the expiration of the estate limited in remainder." Fearne Rem., pp. 2, 217. Its distinguishing characteristic is a present capacity to take effect in possession if the possession were to become vacant, and not the certainty that the possession will become vacant, before the estate limited in remainder determines. Coke upon Lit., B. & H. Notes, 265 a (2). This remainder passes from the grantor at the time of the creation of the particular estate and vests in the grantee during the continuance of such estate or at the instant of its determination.

It follows as a deduction from these principles that upon the death of John H. Ziegler a particular estate and a vested remainder simultaneously passed by the devise. At that time Frederick H. Ziegler had no children; his son and coplaintiff, who is his only child, was born during the lifetime of the widow, it is true, but more than two years after the testator's death. What, then, is the quantity of interest embraced in the remainder? In a devise of land to A. and his children or issue, if there is a child or issue when the devise takes effect, the devisees take the estate as tenants in common. *Moore v. Leach*, 50 N. C., 88; *Gay v. Baker*, 58 N. C., 344; *Hunt v. Satterwhite*, 85 N. C., 74; *Silliman v. Whitaker*, 119 N. C., 92; *Whitehead v. Weaver*, 153 N. C., 88; *Candor v. Secrest*, 149 N. C., 205; *Cullens v. Cullens*, 161 N. C., 344; *Cole v. Thornton*, 180 N. C., 90. But if there is no child or issue the following principle applies: "If A. devises his lands to B., and to his children or issue, and he hath not any issue at the time of the devise, the same is an estate tail; for the intent of the devisor is manifest and certain that his children or issue should take, and as immediate devisees they cannot take, because they are not *in rerum natura*, and by way of remainder they cannot take, for that was not his intent, for the gift is immediate, and therefore there such words shall be taken as words of limitation, *scil.* as much as children or issue of his body." *Wild's case*, 6 Co. Rep., 16 b; 77 Eng. Rep., 277; *Silliman v. Whitaker, supra: Cole v. Thornton, supra.* Under the devise in question, Frederick H. Ziegler took an estate tail in remainder at common law, which by virtue of our statute is converted into a fee simple. C. S., 1734.

But in the item under discussion there is this further clause: "If he (Frederick H.) should die childless and without issue (that is, without a child or lineal descendant capable of taking by inheritance), then I give the said place and improvements to my heirs in equal degree in fee simple."

Construing the clause in the light of sundry decisions of this Court, we conclude that Frederick H. Ziegler did not acquire an indefeasible fee, but an estate in fee simple defeasible upon the happening of the contingency of his dying childless and without issue, and that such contingency will continue to affect his interest until the estate becomes absolute or the event occurs by which it is to be determined. If the event takes place the estate will go to the ulterior devisees. *Reid v. Neal*, 182 N. C., 192. And this event is to be referred to the death of the remainderman, not to the death of the devisor. *Buchanan v. Buchanan*, 99 N. C., 308; *Williams v. Lewis*, 100 N. C., 142; *Kornegay v. Morris*, 122 N. C., 199; *Harrell v. Hagan*, 147 N. C., 112; *Kirkman v. Smith*, 174 N. C., 603; *Patterson v. McCormick*, 177 N. C., 448; C. S., 1737.

The testator left surviving him, not only Frederick H. Ziegler, but several other children, all of whom answer the designation "my heirs in equal degree."

The judgment of the Superior Court must be

Affirmed.

WEST CONSTRUCTION COMPANY v. ATLANTIC COAST LINE RAILWAY COMPANY.

(Filed 21 February, 1923.)

1. Negligence — Contributory Negligence—Contracts—Evidence—Appeal and Error—Railroads.

Where a building used in connection with the plaintiff's plant has been injured by the negligence of defendant's employees on its train in running a freight car over the bumpers at the end of the track, the damage recoverable is the difference between the market value of the building immediately before and immediately after the injury occurred, and as an element thereof the jury may consider the lessened capacity thereof that the plaintiff could not have avoided in making the necessary repairs: *Held*, under the facts of this case the admission of testimony of a witness of the pecuniary loss of the lessened capacity did not constitute reversible error.

2. Appeal and Error—Evidence—Issues—Verdict—Harmless Error.

The admission of evidence upon an issue answered in appellant's favor cannot be held as prejudicial, or entitle him to a new trial thereon.

3. Negligence—Contributory Negligence—Concurring Cause—Contracts.

Contributory negligence, to bar the plaintiff's right to recover, must consist in some negligent act, or an act of omission or commission inconsistent with his exercise of ordinary care, and which concurring with the negligence of the defendant is the proximate cause of the resultant injury; and a mere breach of contract between the parties that lacks this element of cause and effect is insufficient.

4. Same—Evidence—Nonsuit—Trials.

Defendant railroad company put a spur track on plaintiff's land, to be used in supplying the latter's plant with material for manufacture, under a written agreement that plaintiff would not erect a building nearer than a certain distance from the defendant's track, etc. There was evidence tending to show that the defendant continued to operate on this spur track, and knew or should have known that a certain building was nearer the track than the contract permitted, with further evidence that by the exercise of proper care the defendant's employees could have avoided running a box car across the end of the rails, and injuring the building, for which damages are sought in the action: *Held*, it was for the jury to determine whether the negligence of the plaintiff was such contributory negligence as would bar his recovery, and defendant's motion as of nonsuit was properly overruled.

5. Instructions—Evidence—Contentions—Appeal and Error—Objections and Exceptions.

Exception that an instruction is not sustained by the evidence, and to a statement of the contentions of a party for the lack of evidence, comes too late after verdict to be considered on appeal.

6. Instructions—Request for Instructions—Appeal and Error.

An instruction will not be held for error that is sufficient upon the issue, where the appellant has failed to tender proper prayers upon a particular phase of the evidence that he wishes to have reviewed on appeal.

APPEAL by both parties from *Lyon, J.*, at June Term, 1922, of LENOIR.

The issues and the answers are as follows:

"1. Was the plaintiff's plant and property injured by negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff, by its own negligence, contribute to its own injury and loss, as alleged in the answer? Answer: 'No.'

"3. What damage is the plaintiff entitled to recover of the defendant by reason of the injury done to its physical plant and property? Answer: '$9,000, and interest.'

"4. What other consequential damage is plaintiff entitled to recover of defendant? Answer: 'Nothing.'"

On the verdict, judgment was rendered, from which both parties appealed.

Cowper, Whitaker & Allen for the plaintiff.
Rouse & Rouse for defendant.

DEFENDANT'S APPEAL.

ADAMS, J. The plaintiff is a corporation engaged in the business of constructing streets and highways, and at the time of the alleged injury to its plant (30 September, 1920) was building improved roads in the county of Lenoir. An extensive system of railways is operated by the defendant, a part of whose line is between Weldon and the city of Kinston. For the purpose of prosecuting its business the plaintiff erected an asphalt plant within or near the corporate limits of Kinston, and on 6 April, 1920, entered into a written agreement with the defendant, by the terms of which a spur track was constructed from the defendant's roadbed across and beyond its right of way, and on the plaintiff's land, in order to deliver thereon cars and material for the benefit of the plaintiff. At the trial the plaintiff offered evidence tending to show the following as facts: A decline in the grade of the spur track extended some distance from the defendant's roadbed to a level space, from the further part of which there was an upgrade to the plant; for

five or six months the defendant, in pursuance of its agreement, had regularly left the ingoing freight cars on the spur track about fifty feet from the plaintiff's buildings; and these cars were thence carried by the plaintiff's tractor to a trestle at or near the plant and were there unloaded by opening the bottom of each car and transferring the contents into a hopper underneath. Near the end of the track at the trestle there was a bumper, twelve by twelve, which was secured to the ties by a steel rod or bolt. The injury occurred on Monday morning. On the Saturday preceding the defendant switched three loaded cars into the "siding" or spur track—one with and two without brakes. On the last two the plaintiff's employees "tied" the brakes and chocked the wheels. On Monday morning the defendant shunted or "kicked" into the spur track other loaded cars, which, released from the engine, struck those already on the track with such violence as to force them up the grade. One of the cars "jumped and straddled the bumper" and ran into the plant, moving it off its base, throwing the shafts out of line, changing the structural work from a square to an angle, and doing other damage.

The defendant denied negligence and introduced evidence tending to show that the engine was moving at about four miles an hour when the cars were transferred to the spur track, and that when the engine was a car-length from the main track the engineer received a signal to stop and at once applied the brakes. The engineer testified: "When I applied my brakes couplings were not made back of where we coupled and it caused the cars to run back and hit the others," and gave his explanation of the attendant circumstances. The defendant alleged that the injury was caused by the plaintiff's contributory negligence in constructing its plant in violation of the written agreement, and, entering sundry exceptions, contended that the plaintiff's cause of action, if any, was thereby barred.

The first and second exceptions are clearly untenable and require no discussion. The third, fourth, and fifth present the defendant's objection to evidence offered by the plaintiff to show that the capacity of the plant after the repairs were completed was much less than it was before the injury.

The plaintiff repaired the machinery, but contended that as a result of the injury the former capacity of the plant could not be restored. We understand the defendant to argue, not that the work was negligently done, but that the court should not have admitted evidence tending to show both the cost of the repairs and the diminished capacity of the plant after the repairs were made. In view of the evidence, we perceive no reversible error in the admission of this evidence.

When a trespass committed upon personal property results in an injury less than the destruction or deprivation of the property, or in an

action for a negligent injury to real property, the measure of damages is the reduced market value of the property proximately caused by the negligent act, and the rule generally adopted is to allow the plaintiff the difference between the market value of the property immediately before the injury occurred and the like value immediately after the injury is complete. Sedgwick on Damages, vol. 2, sec. 435; *ibid.*, vol. 3, sec. 935 a; Shearman & Redfield on Negligence, vol. 3, sec. 750; *Spiers v. Halstead*, 74 N. C., 620; *Heiser v. Mears*, 120 N. C., 443; *Jenkins v. Lumber Co.*, 154 N. C., 355; *Farrall v. Garage Co.*, 179 N. C., 389; *Cauble v. Express Co.*, 182 N. C., 448. His Honor did not state this rule literally, but he evidently admitted the evidence for the purpose of enabling the jury to obtain the same result—the decreased value of the property, which was the measure of the plaintiff's actual loss. If as a proximate result of the injury the machinery could not be restored to its former capacity, why was not evidence of its impaired capacity admissible for the purpose of showing the extent of the damage and the decreased value of the plant? The fact that a witness was permitted to express his pecuniary estimate of such diminished capacity—particularly since he was subjected to the cross-examination of the defendant -does not entitle the defendant to another trial.

Nor can we sustain exceptions six, seven, or eight. Since the jury answered the fourth issue "Nothing," we do not see any prejudicial error in the admission of evidence relating to the value of the contract between the plaintiff and the highway commission, or to the defendant's knowledge of the purpose for which the plant was to be used; and the admission of the excerpts from the defendant's answer is sanctioned by the decisions in *Weston v. Typewriter Co.*, 183 N. C., 1; *White v. Hines*, 182 N. C., 275.

The ninth and tenth exceptions involve the soundness of the defendant's motion to dismiss the action as in case of nonsuit. This motion is based primarily upon the plaintiff's alleged breach of section seven of the written contract. The section is as follows: "The shipper shall not erect or permit to be erected any building or structure, nor permit material to be placed within six feet of the nearest rail of the sidetrack, nor permit any structure to be erected above or over the sidetrack with less clearance than 22 feet above the top of the rail. All structures erected over the sidetrack shall be built and maintained in a manner satisfactory to the chief engineer or other proper officer of the railroad."

The defendant contends that according to the undisputed evidence the plaintiff violated the terms of this provision by building within the inhibited distance and by erecting over the sidetrack a structure with a clearance less than twenty-two feet above the top of the rail, and thus by its own negligence, which continued to the moment of the injury, proxi-

mately contributed to the defendant's negligence; and further, that his Honor should have held as a conclusion of law that the concurrent negligence of the plaintiff barred its recovery.

We think there are several reasons why this argument cannot be maintained. Contributory negligence is such an act or omission on the part of the plaintiff, amounting to a want of ordinary care, as concurring or coöperating with the negligence of the defendant is the proximate cause of the injury complained of; but a breach of contract is not essentially a negligent act. In *Hurxthal v. Boom Co.*, 53 W. Va., 87; 97 A. S. R., 965, it is held that while in cases of tort if the plaintiff is guilty of contributory negligence the law forbids recovery, still this principle ordinarily does not apply where a breach of contract is a factor in the production of the injury. There is a distinction between contributory negligence and an act which merely contributes to the plaintiff's injury. "A man may contribute to his injury without affecting his right to recover. In order to defeat his right to recover he must have not only contributed to the injury, but must have contributed to it under circumstances showing negligence on his part." *Williams v. R. R.*, 9 Pac. (Cal.), 155. The law does not require that the plaintiff shall be merely a passive recipient of the injury in order to establish a right to recover of a negligent wrongdoer. It is not the contributory act, but the contributory negligence that defeats recovery. *Wyandotte v. White,* 13 Kan., 191; *Guichard v. New,* 31 N. Y. S., 1080; *Schmidt v. Cook,* 23 N. Y. S., 799. Again, even if the plaintiff was negligent in constructing the buildings in breach of the contract, still if the defendant, with knowledge of the danger, could have avoided the injury by the exercise of ordinary care, and failed to use such care, the negligence of the defendant and not that of the plaintiff would be deemed the proximate cause. In this jurisdiction the defendant's actual knowledge of the danger is not essential; here the principle upon which the doctrine of discovered peril is based is extended to cases where the defendant might have discovered the peril by the exercise of reasonable care, for he who has the last opportunity of avoiding the injury is not excused by the negligence of another. Shearman & Redfield, *supra,* vol. 1, sec. 99; *Pickett v. R. R.,* 117 N. C., 616; *Fulp v. R. R.,* 120 N. C., 525; *McLamb v. R. R.,* 122 N. C., 873; *Bogan v. R. R.,* 129 N. C., 157; *Ray v. R. R.,* 141 N. C., 84; *Haynes v. R. R.,* 182 N. C., 679. The exception, as we understand it, does not depend so much on the question whether the contract concerning the location of the buildings could be waived by the subordinate employees of the defendant, as on the question whether the employees who were charged with the duty of placing cars on the spur track by the exercise of ordinary care should have discovered the peril and avoided the injury. There was evidence to the effect that the

employees of the defendant had been running cars into the spur track for several months, and that they had constructive if not actual knowledge of the buildings and their location, and that on the day the accident occurred they could have prevented the injury by the use of due care; and this precluded the dismissal of the action.

The defendant excepted to the court's instruction upon the second issue on the ground that there was no evidence that the defendant had assented to or acquiesced in the location of the plaintiff's buildings in breach of the contract; but the defendant did not call his Honor's attention to the objection at the time, either orally or by written request for further instruction. When the objection that there is no evidence, or that the evidence is not sufficient, is first made after the verdict, it is too late, and will not be considered. *Mining Co. v. Mica Co.*, 184 N. C., 490, and cases cited. This principle applies also to the exceptions to the court's statement of the contentions of the parties. *S. v. Lance*, 149 N. C., 555; *La Roque v. Kennedy*, 156 N. C., 372; *Phifer v. Comrs.*, 157 N. C., 150; *S. v. Kincaid*, 183 N. C., 710.

The instructions upon the first and third issues were not unfavorable to the defendant, and the subject of the twenty-second exception was the final statement of a contention relating to consequential damages as to which the issue was answered against the plaintiff.

A careful review of the record discloses no error in the defendant's appeal.

No error.

PLAINTIFF'S APPEAL.

ADAMS, J. The plaintiff's motion to set aside the verdict of the jury on the fourth issue was refused. The plaintiff excepted to the ruling, and now insists that it is entitled to consequential damages as a matter of law. This is the only question in the appeal. The plaintiff's claim that the consequential damages were $6,713.21 was denied by the defendant, and his Honor, after stating the several and respective contentions, instructed the jury to allow such consequential damages as were caused by the defendant's negligence.

The instruction was concise, but it presented the chief features of the controversy, and if the plaintiff desired that some special phase of the evidence should be explained, or some special principle of law applied, it should have submitted appropriate prayers for instructions; and having failed to do so, it cannot demand as a legal right that the verdict upon the fourth issue be set aside and only the matters involved therein be submitted to another jury. *Jarrett v. Trunk Co.*, 144 N. C., 301; *Lea v. Utilities Co.*, 176 N. C., 514; *Butler v. Mfg. Co.*, 182 N. C., 552.

In the plaintiff's appeal we find

No error.

S. B. HOLLEMAN v. HARNETT COUNTY TRUST COMPANY AND UNION TRUST COMPANY.

(Filed 21 February, 1923.)

Bills and Notes—Negotiable Instruments—Equities—Notice—Inquiry—Bad Faith—Statutes.

The principle that holds an endorsee of a negotiable instrument subject to the equities existing between the original parties when the instrument is affected with fraud or infirmity is now fixed by statute, C. S., 3033, 3037; and it is now required, however conflicting the former authorities may have been, that "the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith"; and it is reversible error for the judge to charge the jury, in effect, that he would be bound by the original equities if he had such notice as would induce a prudent man to inquire into the circumstances and discover the defect.

APPEAL by defendant Union Trust Company from *Devin, J.*, at second April Term, 1922, of WAKE.

On 30 March, 1920, the plaintiff signed four promissory notes, each in the sum of $2,500, payable to himself twelve months after date, and negotiated them to the Cumberland Railway and Power Company. The plaintiff alleged that these notes were procured through the fraud of the railway and power company, and by it transferred to the Harnett County Trust Company, and that the Union Trust Company afterwards acquired the notes without value or consideration and by virtue of an arrangement made for the purpose of giving the Union Trust Company colorable title and of enabling it to sue upon a claim that it did not own; and, further, that neither of the defendants was an innocent purchaser. The defendants alleged, on the other hand, that the Harnett County Trust Company purchased the notes as a holder in due course, and thereafter and before maturity assigned and delivered them to the Union Trust Company. During the trial a nonsuit was taken as to the Harnett Company, and the action was continued as to the Union Trust Company, the plaintiff demanding a cancellation on the ground that the defendants, or at least the Harnett County Trust Company, acquired the notes with notice of the alleged fraud. The issues as answered by the jury were as follows:

"1. Was the execution of the notes of S. B. Holleman procured by false and fraudulent representations, as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant, the Harnett County Trust Company, become the holder of the notes in due course for a valuable consideration, and without notice of such false and fraudulent representations? Answer: 'No.'

"3. What amount, if any, is the Union Trust Company entitled to recover? Answer: 'Nothing.'"

Judgment for the plaintiff. The Union Trust Company appealed.

Maynard & Williams and Pou, Bailey & Pou for plaintiff.
J. M. Broughton and Murray Allen for defendant.

ADAMS, J. His Honor instructed the jury to answer the third issue "Nothing" if they answered the first issue "Yes" and the second "No." There was evidence tending to show that the notes were procured by false and fraudulent representations, as alleged by the plaintiff, and as the title of the Union Trust Company (in case of an affirmative answer to the first issue) was made to depend on the question whether the Harnett County Trust Company was a holder of the notes in due course, his Honor's instruction as to the law applicable to the second issue was a matter of special importance to the defense.

This instruction, in part, was as follows: "To constitute notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith; knowledge of such facts that would have put a reasonable person upon inquiry, the result of which inquiry would have been to discover that there was fraud in the procuring and execution of the instrument. It has been held by our courts if there are such suspicious circumstances accompanying a transaction, or within the knowledge of the party, as would induce a prudent man to inquire into the title of the holder of the consideration of the paper, he shall be held bound to make such inquiries, or if he neglects to do so, he shall hold the paper subject to all equities. In other words, he shall act in good faith, and not willfully remain ignorant when it was his duty to inquire into the circumstances and know the facts. Where such circumstances are presented to him that would arrest his attention and require a prudent man to make inquiry, and the result of such inquiry would show the facts and bring home knowledge, a person may not remain ignorant of information that he is required to know. So that is the question presented upon the second issue." Record, pp. 87, 88.

The defendant excepted particularly to the instruction that if the circumstances were such as would induce a prudent man to inquire into the title of the paper it was the holder's duty to make inquiry, and if he neglected to do so, he should hold the paper subject to all equities.

In our judgment this part of his Honor's instruction cannot be sustained under the law as it is now administered in this jurisdiction.

With respect to the question presented, the decisions in other jurisdictions seem to have fluctuated from time to time in response to the various opinions of the courts by whom they were rendered. In the earlier English cases the *bona fides* of the acquisition of a negotiable instrument was the test adopted for determining whether a holder by purchase or discount was protected against equitable or other defenses which would otherwise have been valid against him. In *Lawson v. Weston,* 4 Esp., 56 (1801), it appeared that a lost bill had been found and fraudulently discounted by the finder, and it was contended that the banker could not recover without using due diligence in inquiring into the circumstances respecting both the bill and person who offered it for discount. *Lord Kenyon* said: "If there was any fraud in the transaction, or if a bona fide consideration had not been paid for the bill by the plaintiffs, to be sure they could not recover; but to adopt the principle of the defense to the full extent stated would be at once to paralyze the circulation of all the paper in the country and with it all its commerce." This doctrine remained the law of England until *Lord Chief Justice Abbott (Lord Tenterden),* in *Gill v. Cubitt,* 3 B. & C., 466 (1824), laid down the principle that if a holder for value acquired the instrument under circumstances which ought to have excited the suspicions of a prudent and careful man he could not recover. *Lord Campbell* says that this rule of "circumstances to excite the suspicion of a prudent and careful man" was generally adopted and applied to all cases where the owner of any negotiable instrument had once been induced by improper means to part with the possession of it, as well as to all cases of accidental loss and of robbery, but that the rule died with its author. Lives of the Chief Justices, vol. 5, page 338. Ten years later (1834) the rule was repudiated in *Crook v. Jadis,* 5 B. & Ad., 909, in which it was held that nothing less than gross negligence should deprive a party of his right to recover on a bill of exchange. The latter doctrine continued in force for two years when the Court of King's Bench, in *Goodman v. Harvey,* 4 Ad. & El., 870 (1836), restored the test of good faith as laid down in the early rule. In that case *Lord Denman, C. J.,* said: "The question I offered to submit to the jury was whether the plaintiff had been guilty of gross negligence or not. I believe we are all of opinion that gross negligence only would not be a sufficient answer, when the party was given consideration for the bill. Gross negligence may be evidence of *mala fides,* but is not the same thing. We have shaken off the last remnant of the contrary doctrine. Where the bill has passed to the plaintiff without any proof of bad faith in him, there is no objection to his title."

This is the rule as reëstablished in England and as followed by the greater number of courts in the United States—the reason being that "the experience of the commercial world, and of the courts before which the doctrines here discussed have so often passed in review, have satisfied jurists as well as men of business that the interests of commerce are best subserved by the liberal view which promotes the circulation of negotiable instruments, and that the bona fides of the transaction should be the decisive test of the holder's rights." 1 Calvert's Daniels on Neg. Ins. (6 ed.), secs. 770 *et seq.*; 2 Randolph on Com. Paper (2 ed.), secs. 996 *et seq.*; Huffent on Neg. Ins., 29, 400, 417.

The contrariety of opinion as to a holder's legal rights in case of fraud was materially affected by the Negotiable Instruments Law, which was enacted with a view to securing uniformity of decision in questions involving the law merchant.

Whether the decisions of this Court rendered prior to the adoption of the act gave color or countenance to the instruction complained of we need not here consider (*Smathers v. Hotel Co.*, 162 N. C., 346), for the principles controlling in the case at bar are now defined by statute. A holder in due course is one who has acquired the instrument under the following conditions: "(1) That the instrument is complete and regular upon its face; (2) that he became the holder of it before it was overdue and without notice that it has been previously dishonored, if such was the fact; (3) that he took it for good faith and value; (4) that at the time it was negotiated to him he had no notice of any infirmity in the instrument or defect in the title of the person negotiating it." C. S., 3033. And section 3037 is to this effect: "To constitute a notice of an infirmity in the instrument or defect in the title of the person negotiating the same, the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith."

In *Smathers v. Hotel Co., supra*, in the discussion of an instruction substantially similar to that which was given in the instant case, *Hoke, J.*, citing section 3037, *supra*, concluded that the law was designed and intended to establish on this subject and in this jurisdiction the rule as it has been long recognized in England and sustained in this country by the great weight of authority. A similar conclusion was reached by *Walker, J.*, in subsequent appeals taken in the same case, 167 N. C., 469; 168 N. C., 69.

Conceding that the burden was on the defendant to show that the Harnett County Trust Company was a holder in due course, we think his Honor committed error in defining notice of infirmity. A part of the instruction is unexceptionable, but there was error in telling the

jury that if there were such suspicious circumstances connected with the transaction or within the knowledge of the holder as would induce a prudent person to make inquiry he should be required to do so, and in case of failure should hold the paper subject to all equities. Such notice merely as would induce a prudent man to inquire into the circumstances is not sufficient. There must have been actual knowledge of the infirmity or defect, or knowledge of such facts as would amount to bad faith in taking the instrument. Section 3037, *supra; Smathers v. Hotel Co., supra; Critcher v. Ballard,* 180 N. C., 111; Crawford's Anno. Neg. Ins. Law, sec. 95; Brannon's Neg. Ins. Law, sec. 56.

The fact that a portion of the instruction is in accord with the provisions of section 3037 does not cure the error of which the defendant complains, for the instructions were so blended that we cannot tell which one influenced the jury to give their verdict for the plaintiff. *Tillett v. R. R.,* 115 N. C., 663; *Edwards v. R. R.,* 129 N. C., 80; *Anderson v. Meadows,* 159 N. C., 404.

It may not be inappropriate to say in this connection that in *Bank v. Branson,* 165 N. C., 344, it appeared that the bank held a large debt against the importing company and took collaterals to secure it without the slightest inquiry as to the solvency of the makers, and discharged the bondsmen from liability by accepting an endorsement without recourse. The excerpt quoted in that case from *Stevenson v. O'Neal,* 71 Ill., 314, and embodied in the opinion in *Dennison v. Spivey,* 180 N. C., 220, is to the effect that when the note is obtained by fraud, one who claims to be a holder in due course must show that he acted in good faith and not in willful ignorance of the facts.

For the error complained of, there must be a

New trial.

JOSEPH A. JACKSON v. THOMAS MILLS ET AL.

(Filed 21 February, 1923.)

Deeds and Conveyances—Mortgages—Foreclosure—Estoppel—Parties—Privity—Strangers.

The owner of lands subject to mortgage conveyed his equity to his wife and children, reserving a life estate. The mortgage was foreclosed and the purchaser subsequently conveyed the land to the original owner for a full consideration and without collusion or fraud: *Held,* when the original owner later acquired title through an independent source, there was no element of estoppel by his deed to his wife and children against his

later conveyance to another under whom plaintiff derives title: and the purchaser at the foreclosure sale was a stranger to the owner's prior conveyance to his wife and children.

APPEAL by defendant from *Connor, J.*, at January Term, 1923, of BEAUFORT.

Thomas Mills owned a tract of land subject to a deed of trust to J. H. Hodges. By deed of 1 November, 1910, Mills conveyed this property to "Cherry Mills (his wife) and the children now living, or which may hereafter be born of the said Thomas Mills and Cherry Mills," of whom there are now ten, reserving to himself a life estate. The only consideration recited in this deed is one dollar, and it contains no covenants against encumbrances and makes no mention of the outstanding Hodges mortgage. There was no actual delivery of the deed, but Mills had it put on record. Thereafter, default in payment having occurred, the Hodges mortgage or deed of trust was duly foreclosed, the land sold and conveyed to W. C. Rodman for $1,300 on 27 November, 1911. Rodman and wife then resold it to Mills for $1,325. Mills and wife, on 18 January, 1913, conveyed part of the land to Simon Hardison, who has since lived on his part; and sold and conveyed the remainder, 18 December, 1916, with full covenants and full value to a land company, who sold and conveyed it and by *mesne* conveyances it came to the plaintiff, Joseph A. Jackson, by deed dated 24 October, 1917, for full value, who has lived on the land since, and placed improvements on it, until now his total investment is $15,000.

The plaintiff having applied to a land bank for a long-time loan, was refused on the ground that he had no title, and this action was brought by him against Mills and wife and children, including those not *in esse*, to establish his right and declare his title. Mills and wife and their two oldest sons, who are of age, filed answer admitting plaintiff's right, and the minors, including those not *in esse*, represented by counsel and the guardian *ad litem*, admitted the facts above stated, but deny the conclusion of law, and assert title in themselves by way of estoppel.

The court adjudged that the plaintiff had a good title and the guardian *ad litem* appeals.

Small, MacLean & Rodman for plaintiff.
John H. Bonner for guardian ad litem.

CLARK, C. J. There is no suggestion that the foreclosure was collusive, and it is admitted that the debt subsisted and payment was in default so that when the land was sold and conveyed, Mills had done nothing and averred nothing which estops him or those claiming under

him in this proceeding. When the purchaser in the mortgage sale conveyed the land to Mills he acquired a title from an independent source, for by his conveyance to his children prior to the foreclosure sale he had conveyed nothing to them which he did not then own, and had made no misrepresentation about the mortgage or covenant against it.

It has been well said that "There never is an estoppel unless both parties, in a solemn manner, by deed or act, agree as to the fact and act upon such agreement, then neither can afterwards be heard to gainsay it." *Kissam v. Gaylord,* 46 N. C., 294; *Bryan v. Eason,* 147 N. C., 284.

True, the doctrine of estoppel has been enlarged to include deeds without covenant or warranties, but only to the extent and for the purpose of protecting bona fide purchasers. But it is still an equitable doctrine, not an inflexible rule, a shield of the innocent and not a sword for destruction. *Weston v. Lumber Co.,* 162 N. C., 165; *Lumber Co. v. Cedar Works,* 165 N. C., 83; *Alsworth v. Cedar Co.,* 172 N. C., 17, and *Door Co. v. Joyner,* 182 N. C., 518.

If anything was said or done by Mills to his children which should estop him, the plaintiff Jackson was not a party to it, nor is he in privity with them. He does not claim by, through, or under them; that is, the children, nor as their successor. *Van Gilder v. Bullen,* 159 N. C., 291.

Assuming that the plaintiff had investigated before purchasing, he would have found Hardison in possession of that part of the land conveyed to him, and Little of the remainder (the part involved in this suit), living in the house. He would have found on the tax books the land listed by Little and on the records he would have found the Hodges mortgage lawfully foreclosed and several *mesne* conveyances down to Little and wife, to whom he paid full value, $10,000. The plaintiff paid his money, took his deed, moved to the land, improved it, paid the taxes from year to year, and increased his investment to $15,000.

The two children who are of age disclaim any interest, and as to those who are still minors there is no title by estoppel which should avail against the plaintiff upon the facts of this case.

This case differs from *Hallyburton v. Slagle,* 132 N. C., 947. In that case it was held that where a person, to defraud his creditors, conveys land and afterwards becomes a voluntary bankrupt and the trustee in bankruptcy in behalf of the creditors sells the land and the bankrupt, through another, becomes purchaser, whatever title he gets by the deed of the trustee accrues to the benefit of the original grantee. There is nothing in this case indicating any fraud, or any intention on the part of the grantor beyond a bona fide conveyance of all the interest he possessed at that time.

Nor is the case of *Van Rensselaer v. Kearney*, 52 U. S., 323, in point, for that case merely holds that the deed is an estoppel upon the grantor from ever afterward denying that he was seized of the particular estate at the time of the conveyance.

In this case it is not denied that the father, at the time of the conveyance, was seized of the premises, but under proceedings in foreclosure, as to which there is no allegation or evidence tending to show collusion, the property was sold, and by subsequent conveyance the title was afterwards conveyed for value to the father, a new source of title, and by sundry subsequent *mesne* conveyances it became vested in the plaintiff for full value and without notice of any alleged defect.

Upon facts admitted or agreed, the judgment is

Affirmed.

ROAD COMMISSION OF EDGECOMBE v. STATE HIGHWAY COMMISSION.

(Filed 21 February, 1923.)

Roads and Highways—County Roads—Change of Route—State Highway Commission—Discretionary Powers—Statutes—Courts.

The statute, Laws 1921, ch. 2, sec. 10, subsec. (b), and sec. 2, give broad discretionary powers to the State Highway Commission in establishing, altering, and changing the route of county roads that are or are proposed to be absorbed in the State highway system of public roads; and where the commission, in pursuance of section 7 of the act, have, as required, posted at the courthouse door of a county a map showing the proposed route, and the county roads to be taken, the limitation of sixty days expressed in the statute is upon the time allowed the county to object; and a subsequent change made by the State Highway Commission in the proposed route prior to the time of building the highway is not reviewable by the court in the absence of an abuse by the commission of the discretionary power conferred on it by the statute.

APPEAL by plaintiff from *Daniels, J.*, at November Term, 1922, of EDGECOMBE.

The defendant, the State Highway Commission, in compliance with Laws 1921, ch. 2, on 2 May, 1921, posted at the courthouse door in Edgecombe a map of the roads in said county in the State system of highways, and notified the road commission of Edgecombe thereof. As located on said map, the road from Tarboro to Halifax was shown as going *via* Speed and Hobgood. Thereafter, on 9 June, 1921, the plaintiff road commission of Edgecombe notified the State Highway Commission that this route was acceptable. The road so selected and mapped

by the State Highway Commission between Tarboro and Scotland Neck passed through Speed and Hobgood, lying partly in Halifax and partly in Edgecombe counties. On 1 September, 1921, the Highway Commission having had a hearing to determine whether finally to approve the route between Scotland Neck and Tarboro passing through Hobgood and Speed, abandoned the location of that part of the route between Moore's Crossing and Scotland Neck, substituting a shorter and, as it adjudged, a better route.

This action is a *mandamus* to compel the State Highway Commission to revert to the original suggestion that the route between Moore's Crossing and Scotland Neck should pass through Speed and Hobgood.

The defendant demurred upon the ground that the complaint did not state a cause of action. The demurrer was sustained, and the plaintiff appealed.

Henry C. Bourne for plaintiff.

Attorney-General Manning and Assistant Attorney-General Nash for defendant.

CLARK, C. J. The only point presented to the Court for decision is whether or not section 7 of the State Highway Act, Laws 1921, ch. 2, operates as a restriction upon the powers of the State Highway Commission in locating the State highways after said commission has mapped out the route in a particular county and has publicly posted same at the courthouse door of that county.

An examination of section 7 of the act shows that it provides tentatively for the location and designation of roads to be thereafter taken over as a part of the State highway system. The act provides that after the map is posted at the courthouse door, the county commissioners may, in 60 days thereafter, enter an objection to the tentative location. If the county commissioners fail to do so, then the road so selected shall be and constitute a part of the State highway system.

The plaintiff contends that such posting of this road on 2 May, 1921, without objection made in 60 days, deprived the State Highway Commission from altering this particular road. Section 7 of the act, however, while making the 60 days a limitation on the time in which the county commissioners could except to the location of the road, especially provides: "A map showing the proposed roads to constitute the State Highway Commission is hereto attached to this bill and made a part hereof. The roads so shown can be changed, altered, added to, or discontinued by the State Highway Commission." The road here which was changed by the State Highway Commission after posting at the

courthouse door, was set out on the map as the proposed road from Tarboro by Speed and Hobgood to Scotland Neck. The State Highway Commission understood it to be purely a proposal, and that section 7 expressly conferred upon the commission authority to alter or change this road, which it did 1 September, 1921, after hearing objections presented to this proposed change.

Furthermore, in a broader view, the State, in the construction of these highways, is acting through an administrative body. Subsection (b) of this act, section 10, defines the power and authority of the State Highway Commission to determine, in the exercise of reasonable discretion, the most practical route between termini. Section 2 of the act provides that the State Highway Commission shall have "full power to widen, relocate, change, or alter the grade or location (of any road therein), or to change or relocate any existing road that the State Highway Commission now owns or may acquire."

It was evidently the intent of the statute that the posting at the courthouse door was to give the State Highway Commission an opportunity to pass upon objections which might be raised against the proposed location by the local authorities and the restriction of 60 days in which such objection could be made was a restriction upon the local authorities only. It was not intended to take from the State Highway Commission the general discretionary authority conferred in section 7 to "change, alter, add to, or discontinue" the roads shown on the map posted by the Highway Commission.

The action of the Highway Commission complained of consisted merely in shortening the road between Moore's Crossing and Scotland Neck (2 points on the road between Halifax and Tarboro). It does not appear that this was an abuse of the authority vested in the Highway Commission, and the court below properly refused to grant a *mandamus* to compel the Highway Commission to adhere to the first or tentative location of the road. Neither by length of time nor long use nor by the allegation of any other fact does it appear that the Highway Commission exercised their discretionary power arbitrarily or abusively, and the judgment is

Affirmed.

TOWN OF TARBORO v. J. W. FORBES.

(Filed 28 February, 1923.)

1. Municipal Corporations—Cities and Towns—Streets—Improvements—Statutes—Constitutional Law—Taxation.

While local assessments against lands along the streets of a city for paving and improving the streets may be regarded as a species of tax, and the authority therefor is generally referred to the taxing power, they are not levied and collected as a contribution to the maintenance of the general government, but more particularly confer advantages or improvements on the lands assessed, and do not fall within the intent and meaning of the State Constitution, Art. V, sec. 5, or our statutes, C. S., 7768, 7901; and the city, in assessing private owners, must take into consideration any city property that abuts on the street improved. C. S., 2710 (14).

2. Same—Legislative Powers—Rule for Assessment.

It is a matter for the Legislature to determine, by statute, whether the land abutting on a street improved shall be assessed for such improvement according to frontage, or area, or benefit.

3. Same—Municipal Property—Public Parks.

In the absence of constitutional or statutory provision to the contrary, the public property of a municipality, such as parks, etc., is subject to assessment for local improvements of its streets, and when there is no provision exempting them, a public park of a city is included within the intent and meaning of Laws 1915, ch. 56, providing that lands abutting on a street to be paved or improved should be assessed for such improvements to the extent of the respective frontage of the lots thereon, in a certain proportionate part of the cost, by the "front foot" rule.

4. Same—Petitions—Majority of Lineal Feet—Municipal Orders—Nullity.

Under a statute requiring that a majority in number of the owners of lots and frontage of lots on a city street may petition for the paving and improving of the street upon which their lots abut, lodge the petition in the office of the municipal clerk, who shall submit the petition to the governing body, etc., it is necessary to the validity of the order for the improvement made by such governing body that the owners of abutting land shall have the majority of the frontage, as well as be the majority in number; and where the petition has not been signed for the city, and the city frontage is omitted, an order by the governing body to improve the street in conformity with the prayer of the petition is a nullity.

5. Same—Conclusiveness of Municipal Orders.

Where it appears to the court as a fact that a city has not signed the petition for street pavement and improvements submitted to its governing body through the municipal clerk, and that it was necessary for it to do so for the petitioners to own the required frontage on the abutting street to comply with the statute, a further provision in the statute that the action of the municipal body, upon the investigation and report of the clerk, shall be final and conclusive, will not conclude the court from vacating the order of the city to improve the street according to the

prayer of the petition; for otherwise it would subordinate the law, and the unlawful appropriation of property, to the action of the governing body of a municipality.

6. Municipal Corporations—Cities and Towns—Streets—Improvements—Petition—Statutory Requirements.

The failure of the signature of the owners of a majority of the lineal feet abutting on a street petitioned to be paved or improved, as required by the statute, is a substantial and material departure from the essential requirements of the law under which the improvements are allowable, and will invalidate an assessment accordingly determined upon by the governing board of the municipality ordering the work to be done.

CONTROVERSY without action, heard and determined by *Daniels, J.*, at November Term, 1922, of EDGECOMBE.

The case agreed shows these facts:

East Park Avenue, a street regularly laid off and established in the town of Tarboro, extends from Main to Panola Street, and between these two it is intersected by St. Andrew, St. Patrick, and St. David streets. Abutting the avenue on the north are several residential lots with a lineal frontage of about 1,300 feet, excepting the space occupied by the intersecting streets, and on the south of the avenue is the abutting town common, with practically similar lineal frontage. The common is owned by the town and held for the use and enjoyment of all its citizens.

Some of the owners of the property situated on the north side of the avenue, having a frontage of about 760 feet, and desiring to have the avenue paved, presented to the town commissioners the following petition:

"The undersigned property owners on that part of East Park Avenue, lying between Main Street and Panola Street, do respectfully petition your honorable body, to grade and pave with asphalt pavement, that part of East Park Avenue lying between the streets named, under the act of the General Assembly of North Carolina, being Public Laws of 1915, ch. 56, and further under said act, to charge one-half (1/2) of the total cost of said pavement, exclusive of so much of the cost as is included at the street intersections, to the lots and parcels of land abutting directly on said East Park Avenue (exclusive of the Town Common), according to the extent of their respective frontages thereon, by an equal rate per front foot of said frontage. The said paving to be a 24-foot roadway between the curbs, one-half of the costs to be borne by abutting property owners and one-half by the town of Tarboro, N. C."

In pursuance of the statute, the petition was lodged with the clerk, who testified as a result of his investigation that it was properly signed by a majority in number of the owners, and that they represented a majority of all lineal feet of the frontage abutting on the avenue for

which the pavement was proposed; and thereupon the town commissioners, reciting their finding of facts, made the following order:

"Now, therefore, be it resolved and ordained by the board of commissioners of the town of Tarboro, at its regular October meeting in the year 1919, that that part of Park Avenue which lies between Main and Panola streets be properly graded and paved with asphalt pavement, under and by virtue of Laws 1915, ch. 56, and amendments thereto, and the procedure thereunder; and that for the purpose of securing uniformity of work the same be done by contract of the entire improvement.

"That one-half of the cost of such improvement be hereafter assessed upon the lots abutting directly on said improvement, exclusive of the town common (which property is not to be considered in making this assessment), according to the extent of their respective frontages by an equal rate per foot of such frontage, the assessments against the said lots abutting upon said improvement, exclusive of the common, to be based upon the total cost of paving such street between the limits set out, exclusive of the street intersections."

Thereafter the avenue was paved and the cost of the work was assessed one-half against all the owners of property abutting on the north side of the avenue (except street intersections) and one-half against the town as a municipality. The amount assessed against the defendant is $764.41. The cost of other streets recently paved was assessed one-third against the property owners on each side and the remaining third against the town as a municipality.

His Honor, finding that the petition had not been signed by the town as owner of the common, held that such signing was necessary in order to have said petition signed by the owners representing a majority of the lineal feet of frontage abutting on the avenue, and that as no part of the cost had been assessed against the town as the owner of the common and one-half the cost had been assessed against the owners on the north side of the street, the assessment was illegal and void. There was a judgment for the defendant, and the plaintiff appealed.

Don Gilliam for plaintiff.
Allsbrook & Phillips for defendant.

ADAMS, J. The question first to be determined is whether the park or common described in the record was liable to a special assessment for the paving of East Park Avenue, a contiguous street.

Both the Constitution of North Carolina and the statute law provide that property belonging to the State or to municipal corporations shall be exempt from taxation. (Art. V, sec. 5. C. S., 7768, 7901.) But there

is a distinction between local assessments for public improvements and taxes levied for purposes of general revenue. It is true that local assessments may be a species of tax, and that the authority to levy them is generally referred to the taxing power, but they are not taxes within the meaning of that term as generally understood in constitutional restrictions and exemptions. They are not levied and collected as a contribution to the maintenance of the general government, but are made a charge upon property on which are conferred benefits entirely different from those received by the general public. They are not imposed upon the citizens in common at regularly recurring periods for the purpose of providing a continuous revenue, but upon a limited class in return for a special benefit. These assessments, it has been suggested, proceed upon the theory that when a local improvement enhances the value of neighboring property, it is reasonable and competent for the Legislature to provide that such property shall pay for the improvement. And in the absence of some restraining constitutional provision on the subject, whether the assessment shall be made according to frontage or area or benefit is a question of legislative expediency. Dillon on Municipal Corporations (5 ed.), secs. 1430, 2497; 2 Elliott on Roads and Streets (3 ed.), sec. 663; *Willard v. Presbury*, 14 Wall., 676; *Parsons v. District of Columbia*, 170 U. S., 45; *French v. Barber Asphalt Paving Co.*, 181 U. S., 324; *Chadwick v. Kelly*, 187 U. S., 542; *Raleigh v. Peace*, 110 N. C., 32; *Durham v. Public Service Co.*, 182 N. C., 333; *Morganton v. Avery*, 179 N. C., 551.

In the various jurisdictions there is diversity of opinion with respect to the question whether a municipal corporation may levy a special assessment against its own property when used for the benefit of the public. Generally speaking, the decisions may be classified as follows:

(1) Those in which it is held that a municipality has no power to subject its own property when used for public purposes to a special assessment for a local improvement. *Herman v. Omaha*, 75 Neb., 489; *State v. Several Parcels of Land*, 79 Neb., 638.

(2) Those in which it is held that the property of a municipality is not subject to such special assessment unless expressly authorized by statute. *St. Louis v. Brown*, 155 Mo., 545; *Barber Asphalt Paving Co. v. St. Joseph*, 183 Mo., 451.

(3) Those in which by the great weight of authority it is held that the public property of a municipality is subject to a special assessment for local improvements. *New Orleans v. Warner*, 175 U. S., 120; *Higgins v. Chicago*, 18 Ill., 276; *McLean County v. Bloomington*, 106 Ill., 209; *Newberry v. Detroit*, 164 Mich., 410; *Whittaker v. Deadwood*, 139 Am. St. Rep. (S. D.), 1076; *Boyd v. Milwaukee*, 92 Wis., 456; *Ross v.*

New York, 3 Wend. (N. Y.), 333; *Raleigh v. Peace, supra; Durham v. Public Service Co., supra; Morganton v. Avery, supra.*

In *Scammon v. Chicago,* 42 Ill., 193, it is said: "It appears from the record that there are public grounds on the east side of the street, and a public square, known as Dearborn Park, on the west side, and that these were wholly exempted from the assessment. The entire burden was imposed upon the private property owners on one side of the street, except the cost of the intersections. We are wholly unable to see how this can be reconciled with the principle prescribed by the Legislature, and requiring the assessment to be laid upon all the property benefited. It is insisted by the counsel for the city that this public property is not benefited because it is public, and cannot be sold or diverted to any other than its present uses. But even as a park or public pleasure ground, it is clearly benefited by having the streets bounding it kept in good condition. If it were the pleasure ground of a private corporation, held solely for that purpose, and accessible only to its members, and incapable of alienation, no one would deny that it should be assessed for an improvement of the character in common with the property of individuals. We do not see that the case is different because instead of being the property of a private it belongs to a municipal corporation, in trust for all its citizens."

In *Newberry v. Detroit, supra,* the question was whether a public park abutting on Edison Avenue, a distance of about 820 feet, was subject to a local assessment for paving the avenue under a clause in the city charter levying the assessment according to frontage. *McAlvay, J.,* delivering the opinion of the Court, said: "Construing the language of the charter relative to assessments for paving, we do not find any exemption of public grounds. In cases which hold the extreme doctrine that no property of the state is exempt from special assessments, and also those which hold that certain properties belonging to the public are exempted by statute from taxation, the decisions are harmonious in holding that the exemptions apply 'only to the taxes mentioned in the general tax law.' . . . The requirement of the law under which this assessment was made is that it must be according to the frontage upon Edison Avenue. Detroit Charter, 1904, pp. 182-184. Voigt Park occupies about one-fourth of this entire frontage. It was not assessed. The entire cost was assessed against the remaining three-fourths, and not according to the frontage of each abutting lot. The law governing these assessments cannot be allowed if any frontage is omitted. This park frontage abutting upon the avenue should have been assessed for this paving. It was not exempt from such assessment."

And in *New Orleans v. Warner, supra, Mr. Justice Brown,* in discussing the question, used this language: "The argument is that public

property, being exempt from taxation, is also exempt from these assessments; but the authorities have long recognized a distinction between general taxes, which are for the benefit of the public generally and which in the nature of things the public must directly or indirectly pay, and special assessments for the benefit of particular property, which are a charge upon the property benefited. If this be private property, then each owner of such property pays his share; if it be public property, the city pays it as the agent of the entire body of its citizens, who are assumed to have been benefited to that extent. *Charnock v. Fordoche & G. T. Special Levee Dist. Co.*, La. Ann., 323." 16 Ann. Cas., 888 n; Ann. Cas., 1917 D, 849 n.

These decisions fairly illustrate the spirit of the prevailing doctrine that a constitutional exemption from taxation of property belonging to a municipal corporation does not apply to special assessments which are made for local improvements; and this doctrine seems to be supported and fortified by a statute which provides that no lands in a municipality shall be exempt from local assessment. C. S., 2710 (4). We therefore hold that in computing the lineal feet of frontage of the lands abutting on the avenue the town common should not have been excluded.

But here another question arises. C. S., 2707, is as follows: "The petition for a local improvement shall be signed by at least a majority in number of the owners, who must represent at least a majority of all the lineal feet of frontage of the lands (a majority in interest of owners of undivided interests in any piece of property to be deemed and treated as one person for the purpose of the petition) abutting upon the street or streets, or part of a street or streets, proposed to be improved. The petition shall cite this article, and shall designate by a general description the local improvement to be undertaken and the street or streets, or part thereof, whereon the work is to be effected. The petition shall be lodged with the clerk of the municipality, who shall investigate the sufficiency thereof, submit the petition to the governing body, and certify the result of his investigation. The determination of the governing body upon the sufficiency of the petition shall be final and conclusive."

The clerk certified that the petition was signed by a majority in number of the owners of the abutting property, and that they represented a majority of all the lineal feet of frontage. Thereupon, the board of town commissioners adopted a resolution reciting that a majority of those who owned abutting property, representing a majority of the lineal feet of frontage had signed the petition requesting that the avenue be paved and providing that one-half the total cost, not counting the space occupied by the intersecting streets, should be charged against the abutting lots "exclusive of the town common." The board also held that the petition was in compliance with the law, and was

"sufficient in all respects." In these circumstances, then, the immediate inquiry is this: Since the common was subject to the special assessment in like manner with other property fronting the avenue, and since it appears from the petition, the clerk's certificate, and the resolution of the board of commissioners that no assessment was made against the common, shall the defendant be denied the right of contesting the alleged validity of the assessment against his property on the ground that the determination of the governing body is final and conclusive?

An affirmative answer would imply the possibility of subordinating the requirements of the law to "the determination of the governing body" of a municipality, and of appropriating the defendant's property without authority of law. It is hardly conceivable that the Legislature, in prescribing the power of such governing body, contemplated or intended such a result.

From what has been said, it follows as a logical conclusion, we think, that the assessment charged against the defendant's property is invalid. While a slight informality of procedure, or a failure to observe a provision which is merely directory, will not generally affect the validity of an assessment, it is nevertheless true that any substantial and material departure from the essential requirements of the law under which the improvement is made will render an assessment therefor invalid. The proceeding discloses a material defect in that the signers of the petition, although a majority in number of the owners, do not represent a majority of all the lineal feet of frontage of the lands abutting upon the improved avenue, as required by the statute. The charge against the defendant's property, therefore, cannot be sustained. 5 McQuillin on Mun. Corp., sec. 2111, and note; 4 Dillon on Mun. Corp., sec. 1402, and note; *Ziegler v. Hopkins,* 117 U. S., 683; *Ogden v. Armstrong,* 168 U. S., 236; *Holland v. Baltimore,* 11 Md., 186; *Greensboro v. McAdoo,* 112 N. C., 359; *Charlotte v. Brown,* 165 N. C., 438.

The judgment is

Affirmed.

BRANCH BANKING AND TRUST COMPANY v. JOHN W. LEGGETT.

(Filed 28 February, 1923.)

Bills and Notes—Negotiable Instruments—Mortgages—Goods Sold and Delivered—Vendor and Purchaser—Title Retained—Purchaser for Value—Equities.

A note under the unconditional promise of the maker to pay a specific sum of money at a designated time is a negotiable promissory note, the negotiability of which is not affected because the title to goods sold and delivered for which it was given, is retained by its further terms until pay-

ment thereof shall have been made; or containing stipulations with reference to the disposition of the proceeds and their proper application to the obligor's unqualified promise to pay as contained in the first part of the instrument; and a purchaser for full value before maturity, without notice, is not bound by equities existing between the original parties.

APPEAL by defendant from *Daniels, J.*, at November Term, 1922, of WILSON.

Plaintiff sued as endorsee for value, and claiming to be holder in due course of a negotiable promissory note for $472.50, of date 1 August, 1921, made by defendant to E. P. Hyman & Company, or order, and payable on or before 1 December, 1921, with other provisions appearing on the face of the note. The note was put in evidence with proof on part of plaintiff that same had been sold and endorsed to plaintiff prior to said 1 December, 1921, for full value and without notice of any infirmities or defenses between the original parties other than such as was conveyed by the form or contents of the note.

Defendant answered alleging that said note was given on the purchase of certain machinery from the payee named therein, and sale of which was accompanied by certain guarantees and stipulations which had been broken by such payee to defendant's damage, said damage being set up in the answer on a counterclaim to the amount of $500, and on the trial requested the court to hold that the note was nonnegotiable, with a view and purpose of offering evidence as to the equities and counterclaim alleged to exist between the original parties, as set up in the answer.

The court ruled that the note in question was negotiable, and no further evidence being offered, there was verdict for plaintiff. Judgment on the verdict, and defendant excepted and appealed, assigning for error the ruling of the court as to the negotiability of the instrument.

L. W. Leggett for defendant.

HOKE, J. The note sued on is in form as follows:

"$472.50.

"Dated at Hobgood, N. C., 1 August, 1921.

"On or before 1 December, 1921, for value received, I promise to pay to E. P. Hyman & Company, or order, the sum of $472.50, with interest until paid at six per cent from date.

"This note is given for one Hebner & Sons peanut picker.

"I agree that the title thereto, and to all repairs and extra parts furnished, shall remain in said E. P. Hyman & Company until this and all other notes given for the purchase price shall have been paid in full with all interest. If I fail to pay this note, or if said property is misused, or seized for my debts, the holder of this note may seize and sell the same

at public or private sale, with or without notice; pay all expenses thereby incurred and apply the net proceeds upon this note and other notes given for the purchase price thereof, whether due or not due, and retain all payments before made as rent for the use of said property. I expressly agree to pay any balance on this note remaining unpaid after such property is sold, or if same is burned or otherwise damaged or destroyed after its delivery to me. "JOHN W. LEGGETT. [SEAL.]"

The former portion of this instrument, containing as it does a positive provision to pay a specific sum of money at a designated time, comes well within the definitions of a negotiable promissory note as accepted by approved precedents and the express provision of our statute on the subject. C. S., 2982, 2983, 2984. And in our opinion there is nothing in the last clause of the paper that in any way qualifies or impairs its negotiability. That does not impose upon the obligor the doing of "any act in addition to the payment of the money," but only retains the title to the goods sold as a security for the debt, being under our decisions in effect a chattel mortgage for the purpose, *Lancaster v. Ins. Co.,* 153 N. C., 285, and the stipulations relied upon are in reference to the disposition of the proceeds and their proper application to the obligors' unqualified promise to pay as contained in the first part of the note.

In 8th Corpus Juris, p. 119, the author, after giving several stipulations which would serve to render a note conditional, and therefore unnegotiable, closes with the statement: "On the other hand, although conditions are sometimes implied from the language of the paper, the negotiability of the instrument is favored by the courts, and it is held to be unconditional where the disputed clause is merely a reference to the consideration or its application, or to a fund for its payment." A statement that is in accord with the better considered decisions on the subject here and elsewhere. *Bank v. Hatcher,* 151 N. C., 359; *Bank v. Michael,* 96 N. C., 53; *Chicago R. R. Equipment Co. v. Merchants Bank,* 136 U. S., 268; *Banking Co. v. Gray,* 123 Ala., 258; *Bank v. Slaughter,* 98 Ala., 602; *Equity Insurance Co. v. Taylor,* 131 N. Y. Supp., 475; *Walker v. Wooten,* 54 Ind., 164; *Union Bank v. Spies,* 151 Iowa, 173; *Heard v. Dubuque,* 8 Neb., 10; *Choate v. Stevens,* 116 Mich., 28; 4 A. & E., pp. 88 and 89; 3 R. C. L., p. 917.

In this jurisdiction the question would seem to be put at rest by the terms of the Negotiable Instrument Act, C. S., 2986, which makes provision as follows: "An instrument which contains an order or promise to do any act in addition to the payment of money is not negotiable. But the negotiable character of an instrument otherwise negotiable is not affected by a provision which (1) authorizes the sale of collateral securities in case the instrument be not paid at maturity; or (2) author-

izes a confession of judgment if the instrument be not paid at maturity; or (3) waives the benefit of any law intended for the advantage or protection of obligor; or (4) gives the holder an election to require something to be done in lieu of payment of money, etc."

In *Bank v. Bynum*, 84 N. C., 25, to which we were cited by counsel for appellant, there were stipulations in the instrument which rendered same uncertain both as to the time and amount of payment. And *Kempton v. Studebaker Bros.*, 14 Idaho, 552, may be distinguished on the same ground, the instrument containing the stipulation that the payee had full power to *declare* the *note due* and take possession of the property before the time specified provided it deemed itself insecure. But not so here, the instrument, as stated, containing an unqualified promise to pay a designated sum at the time specified, and "carrying the personal credit of maker in support of the promise." 4 A. & E., p. 89.

There is no error, and the judgment in plaintiff's favor is affirmed.

No error.

O. F. WHITE v. THE FISHERIES PRODUCTS COMPANY.

(Filed 7 March, 1923.)

1. Bills and Notes—Negotiable Instruments—Fraud—Evidence—Damages.

Where the plaintiff has given his negotiable note payable to defendant corporation for shares of its stock, under agreement with defendant's agent procuring it that it would not be binding unless or until the plaintiff sold his farm, of which the plaintiff would notify the defendant, which was not done, and this note is acquired in due course by an innocent purchaser for value, without notice of the equities existing between the original parties; it is evidence sufficient, with the declaration of the agent obtaining the note made to another prior thereto, that he "was going out to tackle the plaintiff, and see if he could not put something over on him," to show that the defendant's agent obtained the note upon a fraudulent promise he had no intention of performing at the time he made it, and entitles the plaintiff to recover in his action for fraud and deceit against the original payee.

2. Same—Written Instruments—Evidence.

Where a negotiable instrument is void as having been obtained by fraud of the payee's agent, its further provision giving authority of the maker for its negotiation, and also reciting that he had received cash therefor, does not exclude, as between the original parties, parol evidence of the fraud in its inception, on the ground that it contradicted the written terms of the note.

APPEAL by defendant from *Horton, J.*, at November Term, 1922, of BERTIE.

The action is to recover damages for wrongfully negotiating by endorsement, and to a holder in due course certain notes of plaintiff in breach of defendant's agreement to hold same until a binding contract should have been made by the parties. (2) For false and fraudulent representations on part of defendant's agent in charge of the matter, by which plaintiff was induced to sign and deliver the notes in such form that defendant was enabled to negotiate the notes to a holder in due course to plaintiff's damage.

In either aspect of the matter there was denial of liability on part of defendant. On the trial there were facts in evidence tending to show that on 17 June, 1920, plaintiff signed and delivered to defendant's agent three promissory notes, aggregating $11,410, due 1 June, 1921, and on each note there appeared over plaintiff's signature an endorsement in terms as follows: "This is to certify that this note is given for a cash consideration, therefore it will be satisfactory to me for the holder to cash this note before it is due, and I will pay in full at maturity to the purchaser."

There was evidence on part of plaintiff to the effect that these notes were to be placed for safekeeping in the Bank of Colerain, and it was understood and agreed that if plaintiff sold a certain farm in Chowan County at a suggested price before the maturity of the notes, he would so inform defendant and take up the notes, paying principal and interest, and receive therefor 761 shares of stock in defendant company; and further, that should plaintiff fail to sell said farm as above stated, the notes were to be returned and all negotiations abandoned. That instead of depositing said notes in accordance with the above understanding and agreement, defendant's agent wrongfully and fraudulently, and with intent to cheat plaintiff, negotiated said notes to the Bank of Colerain, which became an innocent purchaser for value, and plaintiff was forced to pay said notes at maturity, though he had not been able to sell said farm as contemplated, and the contingency on which the notes were to take effect as between the original parties had not occurred. See statement of facts in former appeal, reported in 183 N. C., 228.

There was further evidence tending to show false and fraudulent statements and assurances of defendant's agent as to the value of the stock, and there were also allegations with supporting evidence on the part of plaintiff to the effect that at the time said notes were obtained defendant's agent had no purpose of abiding by the agreement made, but same was entered into with the fraudulent purpose and design to obtain the notes and at once sell and dispose of same, and thereby cheat and defraud plaintiff, which they did to his pecuniary damage.

Defendant maintained that the contract and agreement was fully shown on face of the written papers, and offered evidence tending to show that the stock was of real value, and that no imposition had been made on plaintiff.

On a former appeal in the cause, reported in 183 N. C., 228, plaintiff having obtained a judgment as for mere breach of the agreement not to presently negotiate the notes, the judgment was set aside and a new trial ordered on the ground that in that aspect of the matter it was not open to plaintiff, by parole evidence, to contradict the express written agreement appearing on the back of the notes. The opinion having been certified down, in deference thereto the case at the present trial was submitted to the jury on the issue of fraud, and verdict was rendered as follows:

"1. Did the defendant fraudulently and wrongfully induce plaintiff to execute the notes, as alleged, and by such fraudulent means obtain possession of the same and fraudulently and wrongfully sell and dispose of same and convert the proceeds thereof to its own use, as alleged in the complaint? Answer: 'Yes.'

"2. If so, what damage has plaintiff sustained, and in what sum is defendant indebted to plaintiff by reason thereof? Answer: '$11,410, with interest from 1 June, 1920.'"

Judgment for plaintiff, and defendant excepted and appealed, assigning errors.

Winston & Matthews and Gillam & Davenport for plaintiff.
O. H. Guion and Rountree & Carr for defendant.

HOKE, J. It is objected to the validity of this recovery: (1) That there is no sufficient evidence of actionable fraud avoiding the contract as it appears in the written instruments; (2) that the evidence offered and received is incompetent as being in contradiction of the written stipulations appearing on the back of the notes. But in our opinion neither position can be sustained.

As to the first objection, in a case at the last term of *Williams v. Hedgepeth*, 184 N. C., 116, it was said: "It is established by the great weight of authority, and is held for law in this jurisdiction, that where one under the guise of a purchase acquires the goods or property of another under a promise to pay or perform, and has at the time a settled purpose to do neither, such transaction will be regarded as a fraudulent one on the part of the pretended purchaser, and same may be set aside at the instance of the vendor. In Benjamin on Sales (7 ed.), at p. 470, the American Annotator states the position as follows: 'Another well established species of fraud by a vendee is purchasing with a positive

intention not to pay for the goods. If such intention were known to the vendor he certainly would not sell. Its suppression, therefore, is a legal fraud,' citing, among many other authorities, *Des Farges v. Pugh,* 93 N. C., 31; *Wallace v. Cohen,* 111 N. C., 103; *Donaldson v. Farwell,* 93 U. S., 631; *Stewart v. Emerson,* 52 N. H., 301, presenting an elaborate and learned opinion by *Associate Justice Doe; Watson v. Silsby,* 166 Mass., 57. And a subsequent case in this State of *Rudisill v. Whitener,* 146 N. C., 403, is an approval of the principle as stated. And in Bigelow on Fraud the author says: 'That according to the current of authority upon this subject, a debt is created by fraud, where one intending at the outset not to pay for property induces the owner to sell it to him on credit by falsely representing or causing the owner to believe that he intends to pay for it, or by concealing the intent not to pay.'"

The jury having accepted plaintiff's version of the occurrence, it appears that defendant company, through its agent, under an agreement not to negotiate the notes till notified of the sale of plaintiff's farm, and that same should not bind unless and until such sale was had, immediately, and in violation of the agreement, sold same by endorsement to the bank, thus conferring upon the bank full power to enforce collection from plaintiff as a holder in due course.

It further appears that on the day of the occurrence, and before going out to plaintiff's residence some miles in the country, this agent consulted with the cashier of the bank as to whether White's notes would be good for eight or ten thousand dollars, and whether the bank could handle the paper. And further said to the cashier that he was going out to tackle White and see if he couldn't put something over on him. And returned after dinner with the notes signed by White.

True, in the cases cited there had been an executed sale, but here the facts permit the inference that having the fraudulent purpose in his mind at the time, defendant's agent obtained the notes under the guise of a bona fide agreement not to negotiate, and the cause comes clearly within the principle stated, and the authorities are decisive against defendant's exception.

And on the second objection, that parole evidence tending to show fraud in the contract was excluded by the written stipulation appearing on the back of the notes; in *Miller v. Howell,* 184 N. C., 119, it was held, among other things: "Stipulations in a written contract made by an agent in behalf of his principal that exclude all evidence of agreements made by the agent that are not contained in the written contract are maintainable when the contract itself is valid and enforceable; but where the verbal representations of the agent are fraudulent, and affect the existence of the contract, they are admissible to set it aside in its entirety."

This was virtually held in the former appeal in the cause, 183 N. C., 228, and the position is in full accord with the authorities on the subject. *Machine Co. v. Bullock,* 161 N. C., 1; *Machine Co. v. McKay,* 161 N. C., 584; *Machine Co. v. Feezer,* 152 N. C., 516; *Hickly v. Oil and Pipe Line,* 132 Iowa, 396; *Garrison v. Machine Co.,* 159 N. C., 285; 10 R. C. L., pp. 1058-1059. As said in *Feezer's case, supra:* "To hold the contrary would be to sanction the principle that the deeper the guilt the greater the immunity, and enable fraud by its own contrivance to so entrench itself that its position would in many instances be practically unassailable."

We find no reversible error in the record, and the judgment in plaintiff's favor is affirmed.

No error.

S. E. HINES v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 March, 1923.)

1. Commerce—Railroads—Intrastate.

The employment of rechecking baggage that had been transported into the State by a railroad company, to another station in the State upon its transfer to another line, is an intrastate transaction.

2. Railroads—Negligence—Evidence—Nonsuit—Employer and Employee—Master and Servant.

Where a railroad company has failed to furnish its employee a truck for the handling of baggage at its station, evidence that such failure had caused the employee to be ruptured by reason of his having to handle the trunks without it, is sufficient upon which to deny the defendant's motion as of nonsuit, and take the case to the jury.

3. Same—Statutes—Contributory Negligence—Assumption of Risks.

Where there is evidence that the employee of a railroad company, in intrastate commerce, was ruptured while handling heavy baggage at the station by the unaided use of his personal strength, when the company had promised to furnish him a truck proper for the service, the use of which would have avoided the injury, it is for the jury to determine whether the defendant was negligent in failing to supply the truck, or whether the plaintiff assumed the risk in attempting to lift the trunk, under the circumstances, or whether these were the proximate cause of the injury. C. S., 3468.

4. Same—Burden of Proof.

Contributory negligence does not bar the right of an employee of a railroad to recover damages for a personal injury alleged to have been negligently inflicted on him in an intrastate transaction, and where there is evidence of the latter's negligence, the burden is upon the defendant to show the contributory negligence on the plaintiff's part, and the assumption of risks, when relied upon, and a judgment as of nonsuit should be refused.

5. Railroads — Negligence—Assumption of Risks—Evidence—Questions for Jury—Nonsuit—Trials.

Where there is evidence tending to show that in intrastate shipments the plaintiff was injured while handling baggage for defendant railroad, caused by the failure of the defendant to furnish him a truck with which to safely do this work, and that plaintiff had previously called the want of this implement to the defendant's attention, and that it had failed to fulfill its promise in supplying it, the fact that the plaintiff continued to work, relying upon the defendant's promise, does not, as a matter of law, bar his right of recovery, the question being for the jury to determine whether the defendant continued in this employment under circumstances that were obviously dangerous, or he should have known or appreciated the danger in doing so.

6. Railroads—Negligence—Evidence—Baggage—Checking—Personal Injury—Excess Weight—Questions for Jury—Nonsuit.

Where a railroad company has a different system of checking for baggage exceeding 150 pounds in weight, and has negligently failed to furnish its employee with a truck with which to handle trunks safely, and he has been ruptured in handling or lifting a trunk, in intrastate movements, 100 pounds in excess, without indication by the check or otherwise that it was overweight, the failure of the defendant to have properly checked the trunk is some evidence of its negligence that will take the case to the jury upon the issue.

STACY, J., concurs in the result.

APPEAL by plaintiff from *Calvert, J.*, at August Term, 1922, of PITT.

This is an action by the plaintiff for injuries sustained by him in the course of his employment. The plaintiff was the agent of the defendant company at Oak City, N. C., on its line between Parmele and Weldon. His duties required him to sell tickets, receive and deliver freight, and handle baggage. In January, 1913, the plaintiff alleges and testified that in lifting a piece of baggage from the ground to the train he sustained a slight rupture, and immediately requested the defendant's superintendent to supply him with a baggage truck. The truck was not sent, and though the plaintiff repeatedly asked for the same, and was assured that it would be sent, it was not supplied.

In June, 1916, as the complaint alleges, and plaintiff testified, a piece of baggage was put off at Oak City and remained some hours. The baggage was checked with a plain check, nothing to indicate that it was of excessive weight. On the same afternoon when the train for Greenville was coming into the station, the owner of the baggage applied for a check to Greenville. The check was issued and the plaintiff immediately went to the train and attempted to put it on. The baggage was so heavy that when plaintiff lifted it, as he testified, it tore him loose in the lower part of the abdomen. He fell to the ground and was severely injured, from which injuries he has never recovered.

The baggage in question weighed 250 pounds, being 100 pounds overweight, and the plaintiff testified that there was no check on its arrival

there which showed it was excess baggage or he would not have attempted to lift it. On account of the injuries sustained, the plaintiff was compelled to go to a hospital for treatment, and by reason of his injuries he was obliged a short time thereafter to give up his job, and since that time has not been able to do any heavy work of any kind, and is advised that he may suffer from strangulated hernia at any moment.

The plaintiff was corroborated as to these circumstances by several witnesses. At the close of his testimony the court granted defendant's motion to nonsuit. The plaintiff excepted and appealed.

S. J. Everett and Albion Dunn for plaintiff.
Skinner & Whedbee for defendant.

CLARK, C. J. According to the allegations and the evidence, this was an intrastate transaction, the baggage of the passenger being checked from Oak City to Greenville, N. C. The evidence for the plaintiff on this motion to nonsuit must be taken in the light most favorable to him, and presents two causes of action: the negligent failure of defendant company to supply the plaintiff with the necessary equipment with which to perform the duties of his position, although he had asked for such equipment and been promised the same; and the negligent failure of the defendant company to indicate to the plaintiff that the baggage which had been brought by it from another point and delivered at Oak City was of excessive weight.

The evidence that the plaintiff had been injured by lifting a piece of baggage previously in 1913, and had complained to the superintendent, repeatedly asking for a truck, which the superintendent often promised to send but did not, was evidence of negligence sufficient to go to the jury. *Pigford v. R. R.*, 160 N. C., 93. That he continued in the line of his employment, expecting compliance with the promise to send the truck, did not bar him by reason of any alleged assumption of risk. C. S., 3466, 3468. As said in *Pigford's case, supra*, a servant is not required to leave the service or refuse to go on with the work unless the danger is obvious or he knows and appreciates the danger.

In this case there was no mark on the baggage indicating that it weighed over 150 pounds. The fact that the company in bringing the baggage from Norfolk to Oak City had made no such indication by checking or otherwise, was evidence of negligence. In *Cherry v. R. R.*, 174 N. C., 265, the plaintiff recovered the damages sustained in lifting a large cross-tie in the course of employment.

C. S., 3465, provides that "any servant or employee of any railroad company operating in this State who shall suffer injury" in the course of his employment . . . "by any defect in the machinery, ways, or appliances of the company shall be entitled to maintain his action"; and

in this case the plaintiff was entitled to have the jury determine whether the defendant company was negligent in failing to supply the truck; whether the plaintiff assumed the risk in attempting to lift the baggage; and whether these were the proximate causes of the injury. This being an intrastate matter, under C. S., 3467, the plaintiff was entitled to have his cause submitted to the jury, for, as therein provided, contributory negligence being no longer a bar to an action by an employee against the railroad for injuries sustained during his employment and the assumption of risk were for the jury, the burden of proof being upon the defendant.

The baggage was at the station, it was necessary to put it on the outgoing train, it was the plaintiff's duty in the course of his employment to put it on, and he had to do it without other means at hand than his own strength, the company having failed to furnish him with proper appliances. He had no warning that the baggage was excessive in weight.

As to the second ground of negligence alleged: The failure of the defendant company to indicate that the baggage complained of was of excessive weight, the testimony of the plaintiff was that the company issued a different kind of check for baggage over 150 pounds weight. This baggage having been brought there from Norfolk by the defendant company, the transfer of it to another line of the defendant and the checking of it from Oak City to Greenville was a part of the intrastate carriage, and our State statute applies.

From both points of view, *i. e.*, the failure to supply a truck for lifting baggage after notice to the superintendent of an injury previously sustained and the failure of the company to comply with its repeated promises to furnish such truck, and also by reason of this baggage being left at Oak City without any indication of its excessive weight, the evidence should have been properly submitted to a jury.

The burden of proof of the allegations of contributory negligence rests upon the defendant, *Sims v. Lindsay,* 122 N. C., 682, and numerous cases cited thereto in the Anno. Ed.

Assumption of risk is also a matter of defense analogous to contributory negligence to be passed upon by the jury who are to say whether the employee voluntarily assumed the risk; it is not enough to show merely that he worked on, knowing the danger. *Lloyd v. Hanes,* 126 N. C., 359, and numerous cases cited thereto in the Anno. Ed.; C. S., 3468.

It is worthy of note that this injury occurred seven years ago. There should not be such delays in the courts.

The judgment of nonsuit must be

Reversed.

STACY, J., concurs in result.

J. W. WARRINGTON v. N. W. HARDISON AND L. V. HARDISON.

(Filed 7 March, 1923.)

1. **Mortgagor and Mortgagee — Landlord and Tenant — Crops—Liens—Priorities—Deeds and Conveyances—Registration.**

   The principle upon which the mortgagee by parol agreement may become the landlord and the mortgagor his tenant of the mortgaged land after the mortgagor's default, cannot give the landlord before default a lien for supplies, etc., superior to the lien of a chattel mortgage upon the crops raised, when the mortgagee has received and registered his mortgage while the mortgagor was in possession of the premises and before the default occurred or the parol agreement had been made.

2. **Pleadings — Amendments—Discretion of Court—Mortgages—Liens—Statutes.**

   In an action by the mortgagee to recover the value of a crop, subject to the lien of his chattel mortgage against the defendant, who is alleged to have received it to his own use, it is discretionary with the trial judge to allow the plaintiff to amend his complaint, either before or after verdict, so as to increase the amount of his demand in conformity with the facts he has proved upon the trial. C. S., 547.

APPEAL by defendants from *Calvert, J.*, at November Term, 1922, of PAMLICO.

This action was to recover the sum of $200 on account of defendants having received for their own use from one Shaw Blount three bales of cotton on which plaintiff held a chattel mortgage.

On 6 February, 1919, Shaw Blount executed to N. W. Hardison a mortgage on the real estate of said Blount, and on 19 November, 1919, said Blount executed to plaintiff a chattel mortgage which was duly recorded, covering the crops to be raised during the year 1920 on the same land covered by the mortgage on the realty. About 1 February, 1920, Hardison, as mortgagee, took possession of the property under the power in his mortgage and under an oral agreement Shaw Blount, the mortgagor, became his tenant for the year 1920. Hardison thereafter furnished some supplies to run the farm that year, and demanded the crop in the fall which was turned over to him. The mortgage deed on the realty had fallen due 1 November, 1919. Verdict and judgment in favor of the plaintiff. Appeal by defendants.

J. V. Rawls for plaintiff.
F. C. Brinson for defendants.

CLARK, C. J. The court charged the jury that "the existence of the real estate mortgage given by Blount to the defendant Hardison would not constitute the relation of landlord as between them, or, if the jury

should find the facts to be as testified by them that would not constitute the relation of landlord and tenant between Hardison and Blount." The court also charged the jury: "The plaintiff contends that in this case there was a registered chattel mortgage on these three bales of cotton purchased by the defendant Hardison from Shaw Blount; that the evidence tends to show that there was a chattel mortgage given by Shaw Blount on the cotton to be raised on the land in question which was executed on 19 November, 1919, and duly registered, and that the three bales of cotton purchased by Hardison from Shaw Blount were raised on that land and covered by that chattel mortgage. The plaintiff further contends that there were three bales of cotton, that the mortgage value was about 13 cents a pound, which would make the bales worth about $225, which was the price paid for cotton at that time, and was the market value. Now, if you find the facts to be so from this evidence you will answer the issue $225."

The mortgage on real estate, executed February, 1919, to Hardison by Blount, fell due on 1 November, 1919. The plaintiff took the chattel mortgage 19 November, 1919, after maturity of the said mortgage deed. It was held in *Crinkley v. Egerton,* 113 N. C., 444, and approved in other cases since: "After default in the condition of a registered mortgage, the mortgagee can, by parole contract, become landlord of the mortgagor so as to avail himself of the landlord's lien on the crops. *Subsequent* lienors are charged with knowledge of the mortgagee's right of entry."

But in *Crinkley v. Egerton, supra,* and in the cases approving it, it was contracted for in the mortgage, as registered, that the mortgagee was entitled, as additional security, to the landlord's lien on the rents. In *Jones v. Jones,* 117 N. C., 254, and cases cited thereto in the Anno. Ed., it was held that an oral agreement by which the mortgagor became the tenant of the mortgagee was valid as between the parties thereto. Neither of these cases are authority in the present instance, where the owner of the land, though mortgagor, executed a chattel lien for advances, reciting that he was owner and in possession of the land on which the crop was to be raised, and, subsequent to the registration of such chattel mortgage, by an oral agreement, the mortgagor became tenant to the mortgagee as landlord, for no title to realty can pass by an oral agreement as to rights accrued under a prior registered chattel mortgage.

It is true that in *Ford v. Green,* 121 N. C., 70 (in which two members of the Court dissented), it was held that when the mortgagor had surrendered possession to the mortgagee, who by oral agreement became landlord to the mortgagor, the landlord's lien had priority over the

chattel mortgage, but in that case Green, the mortgagor, had surrendered possession to the mortgagee, who thus became landlord some four years or more before the holder of the chattel mortgage acquired his lien on the crop, and the mortgagee had been in actual possession as landlord several years prior to the execution of the chattel mortgage; while in the present case the chattel mortgage was given and recorded on 19 November, 1919, when the mortgagor was still in possession, and the holder of the chattel mortgage has advanced $666.64 under the chattel lien, which specified that the crops were to be raised by Blount (at that time the owner of the land) "on his own land, which was in his own possession," and the oral agreement by which in this case the mortgagor became the tenant and the mortgagee landlord was made some two months subsequent to the execution and registration of the chattel mortgage. The oral agreement between the mortgagor and the mortgagee did not convey the legal title as to the plaintiff, who had a prior registered chattel mortgage and made the advances on the faith thereof. C. S., 2480.

The holder of a chattel mortgage, duly registered, on these facts, has priority under the terms of the Connor Act, C. S., 3309, which provides: "No conveyance of land is valid as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, but from registration thereof"; and, of course, such chattel mortgage is superior to the subsequent oral agreement by which the mortgagee became landlord and the mortgagor tenant. Whatever force this agreement had as between the parties could not avail against the registered chattel mortgage by one who was owner and in possession at the time it was executed and which specified that the crops were to be raised by Blount "on his own land, which was in his own possession," and the crops were in fact raised by Blount on the land thus described.

The exact point was passed upon in *Killebrew v. Hines*, 104 N. C., 182, where it was held that the lien of a creditor who makes advances to the mortgagor to make a crop is superior to that of the mortgagee of the land because until the entry of the mortgagee he is assenting to the mortgagor holding himself out as owner of the crop. In that case it was held that where the mortgagor had been permitted to retain possession of the land, the mortgagee could not by entry defeat the claim of a mortgagor who has made advances and acquired an agricultural lien. Of course the agreement between mortgagor and mortgagee subsequent to the execution of the lien could not divest it. The plaintiff's lien, although executed 19 November, 1919, was executed while the mortgagor was in possession and though for the subsequent year was valid under C. S., 2480. The charge of the judge was correct.

The complaint was for the sum of $200, but the court in its discretion had the right to amend the demand increasing it from $200 to $225, "either before or after judgment," and of course before or after verdict "when the amendment does not change substantially the claim or defense by conforming the pleadings or proceeding to the fact proved." C. S., 547.

No error.

MATTHEW B. PERRY v. JOHN WHITE.

(Filed 7 March, 1923.)

1. Easements—Adverse User—Issues.

In order to establish an easement over the lands of another for the flowing of water into a draining ditch, it is not only necessary to show a continuance of this user for twenty years, but that it was continued under a claim of adverse right, and not a permissive user; and an affirmative answer to an issue which does not establish these essential elements necessary to the right of the easement claimed, is insufficient.

2. Issues.

Issues must be so framed that the verdict thereon must necessarily conclude the matter, and leave nothing to conjecture.

3. Same—Appeal and Error—Objections and Exceptions—New Trials.

Where the court submits, over the appellant's objection, an issue to which the answer is not conclusive, and has refused a proper issue submitted by the appellant, a new trial will be ordered on appeal.

APPEAL by defendant from *Allen, J.*, at May Term, 1922, of BERTIE. Verdict and judgment for plaintiff. Appeal by defendant.

Craig & Pritchett and Daniel & Daniel for plaintiff.
Winston & Matthews for defendant.

CLARK, C. J. The plaintiff, alleging an easement, seeks to drain the water from certain basins on his land across the lands of defendant and into defendant's canal. The defendant denied that the plaintiff had such easement or the right to drain across his land into the canal.

The court charged the jury: "Both sides have tendered issues, and I have selected from both, but I confess that I am doubtful whether they are proper ones or not."

In *Snowden v. Bell,* 159 N. C., 497, the rule is clearly laid down that while the right to a private way over the lands of another may be acquired by a continuous adverse use for 20 years, a mere user for the required period is not sufficient to confer the right. It is necessary to

show that the true owner had notice of the claim as one of right by direct evidence or circumstances tending to prove it. When the evidence of the use or possession of a private way over the lands of another is consistent with the contention of the true owner that it was not hostile and adverse, but permissive, the jury should decide the question of adverse user, and it is error for the trial judge to instruct the jury to answer the issue for the one claiming the right if they believe the evidence.

An examination of the record and the exceptions show that this essential element whether the use of the asserted right was adverse was not submitted to the jury. The issue submitted was, "Has said ditch existed and been kept up continuously for draining plaintiff's land for the past 30 years over the land of the defendant?"; and the court erred in rejecting the issue which the defendant tendered as follows: "Is the plaintiff entitled to drain the water from his land through the ditch over the defendant's land and into the canal across defendant's land, as alleged in the complaint?" An affirmative answer to this rejected issue, submitted under proper instructions, would have established the easement. An affirmative answer to the issue submitted does not do so. No right or easement is established thereby; nothing is concluded. Issues must necessarily conclude the matter; nothing must be left to conjecture.

Conceding that the ditch had existed and been kept up continuously for draining plaintiff's land for the past 30 years over the land of the defendant, the plaintiff would not have acquired the right of easement thereby. This user may have been permissive, and the law presumes that it was. Mere user for 30 years will not confer an easement unless it appears that it was adverse. *Snowden v. Bell, supra*, and cases cited therein. *Boyden v. Achenbach*, 86 N. C., 397.

If the defendant had submitted to the issue as given and raised no objection, he would be estopped to object to its wording, but he did object to the issue as submitted by the court, and tendered the court the correct issue, which was rejected, and excepted. For this error there must be a

New trial.

ADELIA SEAWELL v. R. D. HALL.

(Filed 7 March, 1923.)

1. Deeds and Conveyances—Intent—Interpretation—Ambiguities.

By the modern rules, technicalities and the placing of the formal parts of a deed must, in their interpretation, give way to the intent of the parties ascertained from the language of the entire instrument, and where the intent is in doubt, resort may sometimes be had to extraneous circumstances surrounding the testator at the time of the execution of the instrument.

2. Same—Formal Parts—Conveying and Habendum Clauses.

Under the rule interpreting a deed so that the intent of the parties shall prevail as gathered from the language of the entire instrument, the importance formerly attached to the formal parts giving significance to their placing in the instrument, etc., must be subordinated to this intent when properly ascertained; and where, from the *habendum*, construed with the conveyancing clause, this dominant intent clearly appears, it will be given effect.

3. Same—Repugnant Clauses—Title—Fee Simple—Defeasible Fee—De Donis—Statutes.

In the conveyancing part of a deed an estate to the grantor's grandson "and heirs by his mother and assigns," it appearing that at the time the deed was executed the grantor knew that only the grandson could take thereunder; and in the *habendum* "to their only use and behoof forever": *Held*, there is no repugnancy between these clauses in the deed, and the intent was to convey a fee-simple title to the grandson. The effect of the statute *de donis* upon a fee conditional at common law, and our statute converting a fee tail into a fee-simple estate discussed by ADAMS, J.

4. Estates—Estates Tail—Statute—Fee Simple.

Assuming that a conveyance to the grantor's grandson "and heirs by his mother and assigns" conveys an estate to the grantee and a particular class of heirs, as distinguished from heirs general, the estate so created would have been an estate tail at common law, converted by our statute into a fee simple.

CONTROVERSY without action, heard by *Daniels, J.*, on facts agreed, at September Term, 1922, of LEE.

On 1 September, 1922, the plaintiff made a contract to execute and deliver to the defendant a deed conveying a tract of land in fee simple, and in pursuance of said contract tendered to the defendant, a deed sufficient in form to convey the land in fee. The defendant refused to accept the deed on the ground that the plaintiff was not able to convey a title in fee simple as he had contracted to do. The land described in the contract and in the deed tendered to the defendant was conveyed to the plaintiff by A. J. Seawell on 24 April, 1915. The material parts of the deed are as follows: "This deed . . . made by A. J. Seawell . . . to Adelai Seawell, . . . witnesseth: That the party of the first part . . . does bargain and sell to said Adelai Seawell and his heirs by his mother and assigns a certain tract of land, . . . reserving his right in said land his lifetime.

"To have and to hold . . . to the said party of the second part, his heirs and assigns, to their use and behoof forever."

The plaintiff is the grandson of A. J. Seawell, and his mother, who was a daughter of A. J. Seawell, died 21 July, 1892, at the plaintiff's birth, and never received any part of her father's estate. The only part of the estate received by the plaintiff is that which is embraced in his

deed from A. J. Seawell. The plaintiff's father married again, is now living, and has several children born of the second marriage. The plaintiff is the only child of his mother. A. J. Seawell was not married when he executed his deed to the plaintiff. He is dead, and the reserved life estate has terminated.

The defendant contends that the clause to Adelai Seawell and his heirs by his mother vests only a life estate in the grantee, and the plaintiff contends that the conveyance vests an estate in fee.

His Honor held that the plaintiff is not seized of the land in fee, and adjudged that the plaintiff is not entitled to the specific performance of the contract. The plaintiff excepted, and appealed.

D. B. Teague for plaintiff.
No counsel for defendant.

ADAMS, J. Whatever the technicalities of the law may formerly have required in the construction of deeds, the modern doctrine does not favor the application of such technical rules as will defeat the obvious intention of the grantor—not the unexpressed purpose which may have existed in his mind, of course, but his intention as expressed in the language he has employed; for it is an elementary rule of construction that the intention of the parties shall prevail unless it is in conflict with some unyielding canon of construction or settled rule of property, or is repugnant to the terms of the grant. Such intention, as a general rule, must be sought in the terms of the instrument; but if the words used leave the intention in doubt, resort may be had to the circumstances attending the execution of the instrument and the situation of the parties at that time—the tendency of modern decisions being to treat all uncertainties in a conveyance as ambiguities to be explained by ascertaining in the manner indicated the intention of the parties. Discussing the question in *Gudger v. White,* 141 N. C., 513, *Walker, J.,* pertinently said: "It is not difficult by reading the deed to reach a satisfactory conclusion as to what the parties meant, and we are required by the settled canon of construction so to interpret it as to ascertain and effectuate the intention of the parties. Their meaning, it is true, must be expressed in the instrument; but it is proper to seek for a rational purpose in the language and provisions of the deed, and to construe it consistently with reason and common sense. If there is any doubt entertained as to the real intention, we should reject that interpretation which plainly leads to injustice and adopt that one which conforms more to the presumed meaning, because it does not produce unusual and unjust results. All this is subject, however, to the inflexible rule that the intention must be gathered from the entire instrument 'after looking,' as the phrase is, 'at

the four corners of it.'" *Campbell v. McArthur,* 9 N. C., 33; *Rowland v. Rowland,* 93 N. C., 214; *Triplett v. Williams,* 149 N. C., 394; *Beacom v. Amos,* 161 N. C., 365; *Brown v. Brown,* 168 N. C., 4; *Gold Mining Co. v. Lumber Co.,* 170 N. C., 273; *Williams v. Williams,* 175 N. C., 160; *Hinton v. Vinson,* 180 N. C., 398; *Berry v. Cedar Works,* 184 N. C., 187; 8 R. C. L., 1041; 18 C. J., 252; *Whetstone v. Hunt,* 8 Ann. Ca., 444 n; Devlin on Deeds (3 ed.), secs. 836, 839.

Observing the rule that some effect must be given to every word, and that all the provisions of the instrument must be harmonized if possible, in our interpretation of the deed presented in the record, we must consider not only the *habendum*—"to have and to hold . . . to the said party of the second part, his heirs and assigns," which indicates a fee simple—but also the language in the premises which the appellee assails on the ground of its insufficiency to create a fee, namely, "to said Adelai Seawell and his heirs by his mother and assigns."

In *Wilkins v. Norman,* 139 N. C., 40, and in several other cases, it is suggested as an elementary maxim that when there are repugnant clauses in a deed the first will control and the last will be rejected, but in *Davis v. Frazier,* 150 N. C., 451, and other cases, it is held that this principle must be subordinated to the doctrine heretofore stated, that the intent of the parties as embodied in the entire instrument is the end to be attained, and that a subsequent clause may be rejected as repugnant or irreconcilable only after subjecting the instrument to this controlling principle of construction. *Jones v. Casualty Co.,* 140 N. C., 262; *Midgett v. Meekins,* 160 N. C., 42. Having regard to this principle, we must likewise give effect to another of equal importance, which is this: the office of the *habendum* being to lessen, enlarge, explain, or qualify the estate granted in the premises, the granting clause and the *habendum* must be construed together, and any apparent inconsistency reconciled, if possible, because the *habendum* may control where it clearly manifests the grantor's intention. "It may be formulated as a rule that where it is impossible to determine from the deed and surrounding circumstances that the grantor intended the *habendum* to control, the granting words will govern, but if it clearly appears that it was the intention of the grantor to enlarge or restrict the granting clause by the *habendum,* the latter must control." 1 Devlin on Deeds, sec. 215; *Williams v. Williams,* 175 N. C., 165; *Acker v. Pridgen,* 158 N. C., 337.

As we have said, the *habendum* indicates a fee simple; if the words "by his mother," or even the phrase "and his heirs by his mother," had been omitted, the premises also would have conveyed a fee. C. S., 901. It therefore becomes necessary to determine whether the limitation to the grantee's heirs by his mother is repugnant to or irreconcilable with the *habendum.*

The grantee's mother was the grantor's daughter. She died at the birth of the grantee, who is the plaintiff. There are no brothers or sisters or representatives of such on the maternal side, but several brothers and sisters of the half-blood, children of the grantee's father by the second marriage. When the deed was executed the plaintiff's mother had been dead many years, and the grantor knew that the plaintiff was her only child.

At common law a conditional fee was a fee restrained to some particular heirs exclusive of others. 2 Bl., 109. Professor Tiedeman says: "At an early day, as far back as the time of Alfred, it was the custom to limit estates to one and particular heirs, instead of his heirs in general. Generally, it was to the heirs of his body—*i. e.*, his issue, his lineal heirs. But it can be limited to any other class of heirs. If the first taker died leaving no heir of that kind, the estate was defeated and reverted to the donor. But as soon as that class of heirs came into being, as, in the case of an estate to one and the heirs of his body, upon the birth of a child, the condition was held to be so far performed as to permit the tenant to alien or charge the land in fee simple. And the subsequent death of the issue would have no effect upon the purchaser's title. But, if no alienation was made during the life of such heirs presumptive it would revert to the donor upon the death of the tenant, just as if they had never come into being." Real Property, sec. 45.

An estate given to a man and the heirs of his body was called a fee simple on condition that the grantee had issue, and by virtue of the statute *de donis conditionalibus* (13 Ed., 1), a fee conditional limited to the heirs of one's body was denominated a fee tail. Our statute converts estates tail into estates in fee simple, and *Chancellor Kent* says that conditional fees at common law, as known and defined prior to the statute *de donis*, have generally partaken of the fate of estates in fee tail, and have not been revived in this country. 4 Kent's Com., 15.

Now, let us apply these principles. It is obvious that the estate described in the premises is neither a life estate nor a fee tail, and that the grantor did not intend to include in the words "heirs by his mother" other children of the grantee's mother, for he knew there were none; and if the granting clause could possibly be construed as an estate to the grantee and his collateral heirs on his mother's side defeasible upon the failure of such heirs or as an intent to limit the estate to any particular line of descent as a fee conditional at common law, such estate is enlarged by the *habendum* into an absolute fee simple. Our conclusion is, therefore, that the plaintiff is seized of an estate in fee and is entitled to the specific performance of his contract. The judgment of the Superior Court is

Reversed.

A. W. TAYLOR v. R. C. BRIDGER ET AL.

(Filed 7 March, 1923.)

1. Bills and Notes — Endorsers — Sureties—Forbearance—Notice—Statutes—Exoneration.

The requirements of C. S., 3967, are reasonably complied with when the holder of a negotiable note, after receiving notice in accordance with this section within thirty days causes the maker to be made a party defendant, and it is made to appear that he is a nonresident.

2. Same—Stipulations as to Waiver.

Where there is an agreement in a negotiable note that the endorsers will continue to be bound notwithstanding an extension of time granted to the maker, the endorsers cannot avail themselves of the provisions of C. S., 3967, when the maker is a nonresident, demand for payment after dishonor has been made upon the resident endorsers, defendants in the action, and they have delayed to give the statutory notice until after action commenced.

APPEAL by defendants from *Horton, J.*, at October Term, 1922, of HERTFORD.

On 6 November, 1920, J. D. Cox, O. M. Ramier, J. H. Curtis, and J. H. Horton executed to the defendant R. C. Bridger the note sued on, which was endorsed by the other defendants, Horton and Jordan. Before maturity of the note the defendant Bridger endorsed same in blank to the plaintiff for valuable consideration.

Summons issued 28 April, 1922, against the original endorsers, Jordan and Horton and Bridger. After the summons was served and complaint filed, the defendant served notice on the plaintiff under C. S., 3967, to sue the makers of the note, and filed answer admitting the allegations in the complaint, and set up said notice as a plea in abatement, alleging in their answer that plaintiff and said makers were residents of the State of Virginia. The plaintiff in his reply denied being a resident of Virginia, but alleged that he was a resident of Hertford County. In said notice above named, defendants asserted insolvency of the makers of the note, and alleged their own solvency. After service of the notice on him, and within 30 days thereafter, the plaintiff caused the makers of the note to be made parties to this action, and caused summons to be issued against them, but the return of the sheriff showed that they were not to be found. Judgment was rendered against the defendants Bridger, Jordan, and Horton, who appealed.

W. D. Boone for plaintiff.
R. C. Bridger for defendants.

CLARK, C. J. The only question presented is whether the *quia timet* notice under C. S., 3967, would relieve the defendants of their obligation as endorsers of a note, the makers of which were nonresidents.

Independently of this statute, "Forbearance or delay in collecting from the principal debtor furnishes no ground on which the surety can ask for exoneration." *Bank v. Homesley,* 99 N. C., 531.

When the creditor fails to bring suit against the principal upon due notice by the surety or endorsers, there is an implied agreement to forbear which discharges the surety. On the face of the note here sued on there is an express waiver by the endorsers of any extension of time granted the principal, and this waiver denies him the right to invoke the statute, which raises only an implied extension of time to the principal. Since the waiver excuses an express agreement, it necessarily waives any implied agreement that can be inferred from the statute.

The statute requires a creditor to bring suit in "the appropriate court" (C. S., 3967), and to "use all reasonable diligence to save harmless the surety or endorsers." The plaintiff caused summons to issue against the principals in this note upon the demand of defendants that he bring suit against them, but he was unable to obtain service of process and the defendants then alleged that these parties were nonresidents. What greater diligence could the plaintiff use? The statute does not require that after bringing suit in this jurisdiction the action must abate until he goes to some foreign jurisdiction and brings there another action in which he cannot join the endorsers by reason of their nonresidence in that state. "The fact that a debtor lives in or has removed to another state is a lawful excuse for not instituting an action." 27 A. & E., (2 ed.), 515. It is immaterial whether the plaintiff is a resident of this State or not.

The defendants did not invoke the statute until after this suit was brought, although it is admitted in the pleading that demand had been made on them for payment of the note. Of course, they were in danger of loss unless they paid the note and proceeded against the principals. They assumed that danger when they endorsed the note and after suit was brought against them it was too late to serve notice under the statute.

Affirmed.

THE PITT LUMBER COMPANY v. J. R. ASKEW.

(Filed 7 March, 1923.)

Evidence—Telephones—Conversations—Identity of Person Spoken to—Hearsay.

A bystander at a telephone over which another is speaking may testify as to the part of the conversation he has actually heard, in corroboration of the testimony given by the one speaking, when otherwise competent; but he may not, without personal knowledge of the fact when the conversation is denied, give substantive testimony as to the identity of the one spoken to, the same being hearsay.

APPEAL by plaintiff from *Calvert, J.*, at September Term, 1922, of PITT.

Civil action to adjust the differences between the accounts of the plaintiff and defendant.

From a verdict and judgment in favor of defendant, the plaintiff appealed, assigning errors.

Albion Dunn for plaintiff.
F. G. James & Son for defendant.

STACY, J. Plaintiff and defendant, each being indebted to the other, were unable to adjust their accounts by reason of a misunderstanding as to two items, to wit, a loading machine and a crankshaft; hence, this suit to adjust the differences. Plaintiff contends that it sold to the defendant the loading machine in question for $150, and took from him as part payment thereon a crankshaft valued at $65. The defendant contends that the loading machine, by agreement, was exchanged for his crankshaft, and that nothing further was to be paid by him to the plaintiff on account of this trade. The jury accepted the defendant's view of the matter.

The defendant testified that he made the bargain, with respect to the loading machine and the crankshaft, with Mr. Cobb, president of plaintiff company, and that the trade was consummated in a conversation had with him over the telephone. This is denied by Mr. Cobb, who states that he never had any conversation with the defendant over the telephone at all, but that the matter was discussed by them on the train, and that the defendant agreed to pay $150 for the loading machine, less $65, which was to be allowed him for his crankshaft.

Over the plaintiff's objection, the defendant's son, Jerry Askew, was permitted to testify as follows: "I was in the office at the mill at the time of this telephone conversation between my father and Mr. Cobb. I heard my father call Mr. Cobb's name. He was talking to him first

about some wire, and somebody brought up the conversation about the loading machine. My father told him he did not want to buy it; that it was not worth $150; then he said something about the crankshaft."

Here, it will be observed, the witness undertakes to testify to a telephone conversation between his father and Mr. Cobb. He did not know whether Mr. Cobb was at the other end of the line or not. This he could have known only from hearsay, or as a conclusion from what he heard his father say. Cobb denies that any such conversation took place at all. Later the witness testifies, "somebody brought up the conversation about the loading machine." By "somebody" he meant Mr. Cobb or his father. But the witness was not in position to hear what was said by the other party over the telephone, nor did he have any personal knowledge as to the identity of the other party to the alleged conversation, or that there was any other party, or, if there were, that he heard what his father said. We think the witness was permitted to go too far in his testimony. Possibly the incompetent part of his evidence would have been harmless if only the substance and not the fact of the alleged conversation had been denied by the plaintiff.

Declarations made by the defendant over the telephone and in the presence of others cannot be regarded as incompetent simply because the witnesses did not know of their own personal knowledge that the other party to the alleged conversation was the plaintiff's agent, or that there was any other party, or that such alleged party or the plaintiff's agent heard what was said. *McCarthy v. Peach,* 186 Mass., 67. If the alleged conversation took place, as the defendant testified that it did, then what the defendant said was admissible as a part of it. "A telephone conversation between the parties, and upon the subject-matter of the litigation, having been testified to by one of the parties, may also be testified to by a bystander, so far as he heard it." *Kent v. Cobb,* 133 Pac. (Colo.), 424. See, also, 1 R. C. L., 477. Whether the alleged conversation did take place or was fictitious was a question of fact for the jury. *Miles v. Andrews,* 153 Ill., 262, note 1, Ann. Cas., 802. But Jerry Askew should have been confined to what he heard his father say, and not allowed to testify that the conversation was with Mr. Cobb, or that "somebody" brought up the conversation about the loading machine.

For the error, as indicated, a new trial must be awarded; and it is so ordered.

New trial.

T. P. ASHFORD v. JAMES C. DAVIS, AGENT.

(Filed 7 March, 1923.)

1. Summons—Process—Appearance—Waiver—Railroads—Director General—Government.

During the government control of railroads as a war measure, objection for the want of proper service of summons, in an action against one of the railroads, cannot be maintained when the Director General of Railroads has entered a general appearance, amounting to a waiver of insufficient service.

2. Government — Railroads — Summons—Process—Service—Substituted Agent—Parties.

An action against the Director General of Railroads, brought prior to 1 March, 1920, should not be dismissed because service had not been made on the substituted agent of the government appointed under the provisions of the transportation act of 1920, there being no time stated in the act in which such substituted agent shall be made a party.

3. Evidence—Nonsuit.

The defendant's motion to nonsuit will not be allowed when regarding the evidence in the light most favorable to the plaintiff, it is sufficient to sustain his alleged cause of action.

4. Instructions—Requests for Instructions—Appeal and Error.

The refusal of defendant's requested prayers for instruction is not error when the judge has substantially given them in his general charge.

5. Issues—Appeal and Error.

The refusal by the judge of issues tendered by a party to the action is not error when the issues submitted were sufficient to present all the controverted matters in the case.

APPEAL by defendant from *Calvert, J.*, at October Term, 1922, of CRAVEN.

This is an action to recover damages for loss of goods by negligence of the common carrier. The action was begun 16 May, 1919, against W. D. Hines, Director General. Before the trial in the Superior Court, the defendant J. C. Davis was appointed agent by the President under section 206 of the Transportation Act of 1920, and the motion was made by plaintiff at the trial to substitute him in place of Hines, Director General, as Director. Verdict and judgment for plaintiff. Appeal by defendant.

R. A. Nunn for plaintiff.
Moore & Dunn for defendant.

CLARK, C. J. The original service was made on a local agent of the railroad company. W. D. Hines, Director General, appeared in the

register's court, defended the action, and appealed from the judgment to the Superior Court. The general appearance waived all defects and irregularities, and would have been sufficient even if there had been no service at all of the summons shown. C. S., 490.

This action was begun before 1 March, 1920, and there being no stated time in which the agent of the government designated to be substituted for the former Director General was to be made a party, the motion to dismiss the action was properly denied. *Bagging Co. v. R. R.*, 184 N. C., 73.

The motion to nonsuit was properly disallowed, as the court could not consider any of the defendant's testimony in its favor on such motion, but must take the evidence in the most favorable aspect for the plaintiff. *Guano Co. v. Mercantile Co.*, 168 N. C., 223.

The charge of the court put the burden on the plaintiff, not only to prove that the defendant was negligent, but also that such negligence was the proximate cause of the injury. There was no error in refusing the prayers of the defendant as the instructions given substantially covered all that the defendant was entitled to. The issues submitted by the court were sufficient to present all the controverted matters in the case, and there was no error in rejecting those tendered. *Bank v. Ins. Co.*, 150 N. C., 770.

No error.

GEORGE E. CHERRY, JR., v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 7 March, 1923.)

1. Demurrer—Pleadings—Answer—Jurisdiction—Statutes.

A demurrer to the jurisdiction of the court or that the complaint does not state facts sufficient to constitute a cause of action, may be entered after answer filed, and the principle upon which it is ordinarily required that the answer be first withdrawn with leave of the court before demurring to the complaint, does not apply. C. S., 518.

2. Demurrer — Pleadings—Answer—Negligence—Actions—Cause of Action—Proximate Cause.

The complaint in an action against a railroad company to recover damages for a personal injury, alleged that the plaintiff, nine years of age, at the request of defendant's station agent, took a letter relating to defendant's business, to mail it on a train; and after having done so, and upon returning, stumbled over a pile of cinders that had been left on the edge of the "roadway" by the defendant, in violation of a city ordinance, and was consequently injured by a passing train: *Held*, sufficient to take the case to the jury.

3. Municipal Corporations—Cities and Towns—"Roadway"—Streets and Sidewalks—Words and Phrases.

Where a city ordinance prohibits a railroad company from leaving cinders piled on its street, an allegation that the railroad had left a pile of cinders on the "edge of its roadway," in violation of the ordinance, is sufficient, when pertinent to the inquiry, to be submitted to the jury upon the question whether the railroad company had violated the ordinance in having left the cinders piled upon the "street."

4. Demurrer—Pleadings—Answer—Speaking Demurrer.

Where the defendant, after filing answer, has demurred to the sufficiency of the complaint to state a cause of action, the allegations of the answer may not be invoked as an aid to the demurrer, since a "speaking demurrer" is not permissible, and the allegations of the complaint, regarding them in the light favorable to the plaintiff, will alone be considered.

5. Demurrer — Evidence—Pleadings—Contributory Negligence—Burden of Proof.

Contributory negligence must generally be shown by the defendant pleading it, and a demurrer to the complaint will be overruled when the defendant's negligence is sufficiently alleged and there is no allegation of any matter from which contributory negligence may be legally inferred.

APPEAL by plaintiff from *Calvert, J.*, at September Term, 1922, of PITT.

After the jury had been impaneled, the defendant demurred *ore tenus* to the complaint, and from a judgment sustaining the demurrer and dismissing the action the plaintiff appealed.

F. C. Harding, F. G. James & Son, and D. M. Clark for plaintiff.
Skinner & Whedbee for defendant.

ADAMS, J. Generally speaking, a demurrer may not be entertained after the answer is filed unless by leave of court the answer is withdrawn, because a defendant is not permitted to answer and demur to one cause of action at the same time. *Finch v. Baskerville,* 85 N. C., 205; *Moseley v. Johnson,* 144 N. C., 257; *Rosenbacker v. Martin,* 170 N. C., 236. But this ruling does not apply when objection is entered to the jurisdiction of the court or to the complaint on the ground that it does not state facts sufficient to constitute a cause of action. C. S., 518, and cases cited.

After the jury had been impaneled in this case, and presumably after the pleadings had been read, the defendant demurred *ore tenus* to the complaint and moved to dismiss the action for the assigned reason that the complaint does not state a cause of action. Thereby the defendant admitted the truth of the allegations in the complaint, which must be construed in the aspect most favorable to the plaintiff. *Quarry Co. v. Construction Co.,* 151 N. C., 345; *Wilcox v. R. R.,* 152 N. C., 316; *Kendall v. Highway Com.,* 165 N. C., 600; *McGehee v. R. R.,* 147 N. C., 142; *Green v. Tel. Co.,* 136 N. C., 489.

What, then, are the plaintiff's allegations? He says that he was nine years of age when he was injured; that while he was at the defendant's station in the town of Greenville he was requested by the defendant's station agent to mail a letter on one of the defendant's trains which at that time had just started to move from the depot, or was moving slowly; that the letter was addressed to one of the defendant's officers in the city of Wilmington, and related to the defendant's business; that the plaintiff mailed the letter as requested, and while returning along a path at the "edge of the roadway" stumbled over a pile of coal cinders which the defendant had left in the roadway in violation of a town ordinance and was injured by the passing train. The principal alleged acts of negligence are the breach of the town ordinance and the negligent employment by the defendant of an immature and inexperienced youth to go upon a dangerous mission. There are other allegations in the complaint to which we need not more particularly refer. The question is whether the allegations state any cause of action.

While the complaint is not specific or definite as to the proximate cause of the injury, and as to other matters which may be material on the trial, we cannot hold as a matter of law that it is fatally defective by reason of vagueness, or uncertainty, for circumstances are alleged which, if established at the trial by a preponderance of the evidence in accordance with the plaintiff's contentions, will entitle the plaintiff to relief, and this is one of the tests of the sufficiency of the alleged cause of action.

It is contended that the cinders were not in the street, but in the roadway. "Roadway" means a road, and the word "road," while generally applied to highways, has a broader generic sense, including street as well as highway. Web. In. Dic.; *People v. Comrs.*, 4 Neb., 150; *Dubuque County v. Dubuque Company*, 4 G. Greene, 1, 14, 15; *In re Sharett's Road*, 8 Pa. (8 Barr), 89. Whether the defendant piled cinders in the street in breach of a town ordinance is a matter of proof.

Upon the argument here reference was made to the denials and allegations in the answer, but the answer cannot be invoked in aid of the demurrer. In *Wood v. Kincaid*, 144 N. C., 394, the Court said: "A demurrer is an objection that the pleading against which it is directed is insufficient in law to support the action or defense, and that the demurrant should not, therefore, be required to further plead. It is not its office to set out facts, but it must stand or fall by the facts as alleged in the opposing pleadings, and it can raise only questions of law as to their sufficiency. It is a fundamental rule of law that a demurrer will only lie for defects which appear upon the face of the alleged defective pleading, and extraneous or collateral facts stated in the demurrer cannot be considered in deciding upon its validity. A demurrer averring any

fact not stated in the pleading which is attacked, commonly called a 'speaking demurrer,' is never allowable." *Von Glahn v. De Rosset,* 76 N. C., 292; *Godwin v. Gardner,* 182 N. C., 97; *Trust Co. v. Wilson, ibid.,* 166; *S. v. Scott, ibid.,* 870.

The defendant argues, also, that the plaintiff was guilty of contributory negligence which bars his recovery. It will be noted that no evidence was offered at the trial, and that the demurrer relates only to the allegations in the complaint. The plaintiff alleges that on the occasion of the injury he was an inexperienced boy and did not appreciate the risks and dangers incident to mailing the letter; and, moreover, that he was injured, not by reason of his effort to reach the train, but through the negligence of the defendant in obstructing the roadway. Under these circumstances the question whether the plaintiff was negligent is to be determined by the jury upon proof offered at the trial. C. S., 523.

Of course we express no opinion on the merits of the action, but merely hold that the demurrer should have been overruled. The judgment is

Reversed.

CAROLINE WOOD MILLER v. G. P. SCOTT.

(Filed 7 March, 1923.)

1. Appeal and Error—Agreed Case—Supreme Court—Petition—Additional Agreement.

Where the Supreme Court has decided an appeal upon a case agreed submitted to the Superior Court, it may reconsider the case upon a petition setting forth material additional facts agreed to by the parties. *Roebuck v. Trustees,* 184 N. C., 611, cited and applied.

2. Same—Wills—Deeds and Conveyances—Fee-Simple Title.

Where the will of the husband upon a case agreed has been construed on appeal as giving the wife a life estate only, without power to convey the fee according to her contract of sale; but it is made further to appear upon petition to the Supreme Court, under an additional agreement of the parties, that the will empowered the wife, as executrix, to pay his funeral expenses and his other debts, and she had contracted to sell the *locus in quo* for that purpose: *Held,* under the further agreed statement, the wife may convey the fee-simple title to the proposed purchaser thereof, and the former decision is set aside.

THIS is a petition to amend the case agreed by inserting facts which had been omitted therefrom by inadvertence, and to rehear the case upon the amended statement, as made by consent of both parties.

John A. Scott, Jr., for plaintiff.
Dorman Thompson for defendant.

CLARK, C. J. This case was heard at last term, *Miller v. Scott*, 184 N. C., 556, upon an "agreed state of facts" wherein the will was construed and the facts are set out. This petition to rehear is not based upon averment of error in the opinion of the Court rendered upon the agreed statement of facts then appearing in the transcript of the record, but upon the allegation that material averments were inadvertently omitted in the agreed statement of facts. The petition to amend the original case as sent up by the addition of other facts is agreed to by both parties, and they ask judgment upon the facts, as they more fully appear, in the amended agreement.

A precedent for entertaining this petition appears in *Rochuck v. Trustees*, 184 N. C., 611, in which the Court held that when on an appeal "a material fact was omitted from the case agreed, the parties will be given an opportunity to supply the omission by amending their agreed statement of facts and filing the same in this Court, or the cause will be remanded to the end that such additional facts may be found."

In this case the parties have agreed that there were material allegations omitted from the agreed statement of facts at the former hearing, and what these were.

By the will in this case, the testator gave all his property, personalty and realty, to his wife, "whatsoever it be, to have and to hold, and to use as she may see proper the balance of her life," and with power of appointment as to any residue left at her death. It appeared from the state of facts before us that the widow had sold a certain piece of property and the purchaser had doubts as to her right to make title to the same.

Upon the facts then appearing, the Court held that the case came under the decision in *Herring v. Williams*, 158 N. C., 1, which was to the effect that under the will of her husband, the plaintiff took only a life estate in the property, and could not convert it into a fee simple by the process of selling or conveying the same at her will.

The omitted facts now supplied by the amendment made by consent of both parties are that the will empowered the wife as executrix to pay his funeral expenses and all debts, and that the property in question was contracted to be sold by her for the purpose of paying funeral expenses and other indebtedness of the testator, and to reimburse her for the debts of the estate which she had advanced the money to discharge.

Upon this amended agreement as to the facts, it is very clear that the plaintiff, as executrix, was empowered to sell and convey the property in question, and the petition is allowed. The decision upon our former opinion is set aside, and the judgment is affirmed.

Petition allowed.

ZILPHIA HANDLEY v. ANNIE WARREN ET AL.

(Filed 14 March, 1923.)

1. **Gifts—Inter Vivos—Constructive Delivery—Intent—Delivery to Third Person.**

   It is not necessary to the validity of a gift *inter vivos* that delivery be made directly to the donee, if it is made by the donor to another for him with the dominant intent at the time to pass the title.

2. **Same—Judgments—Questions of Law—Questions for Jury—Appeal and Error—Trials.**

   The defendant, heir at law of the deceased, abandoned her purpose to caveat his will in favor of the plaintiff, and there was evidence in defendant's behalf that she and the plaintiff agreed with the clerk of the court, with whom the executor had deposited in settlement, moneys belonging to the estate, that each of the parties should be entitled to a half thereof, and that the clerk should invest it for them: *Held*, upon judgment for plaintiff as a matter of law, the evidence, on appeal, will be considered in the light most favorable to the defendant; and it was reversible error for the trial judge not to submit the question of a valid delivery of the property to the jury.

APPEAL by defendant from *Allen, J.*, at October Term, 1922, of WAYNE.

Civil action to determine the ownership of $700 in the hands of the clerk of the Superior Court of Wayne County.

From a judgment in favor of plaintiff, the defendant, Annie Warren, appealed.

Dickinson & Freeman for plaintiff.
Godwin & Jernigan and George E. Hood for defendant.

STACY, J. In 1919, W. J. Handley died leaving a last will and testament in which he devised and bequeathed all of his property, both real and personal, to his stepmother, Zilphia Handley. The defendant Annie Warren is the testator's only surviving sister. She was dissatisfied with the provisions of her brother's will, and thought at one time that she would file a caveat to have it set aside or to determine its validity; but this was not done. James M. Wood, executor under the will of W. J. Handley, after paying the testator's debts, turned over the balance in his hands, $1,525.90, to the clerk of the Superior Court of Wayne County. Shortly thereafter, according to the defendant's evidence, Zilphia Handley and Annie Warren, who were then living together, entered into an agreement that the money in the clerk's hands should be divided equally between them. They went before the clerk, told him of their agreement, and asked that he put each one's part out at interest for twelve months.

This the clerk agreed to do, stating that the division could be made in this way. Each drew $100 out of the clerk's hands at the time, and signed a joint receipt for $200. Subsequently, Zilphia Handley withdrew from the clerk's hands practically all of her portion of the funds, and now contends that she is entitled to the balance of the original sum because there was no sufficient delivery by her of any part of the money which she agreed to give to Annie Warren. The court below accepted this view of the matter, and rendered judgment for the plaintiff. The defendant contends that the gift was complete, or, at least, that the evidence should have been submitted to the jury for their consideration and determination.

We think his Honor erred in taking the case from the jury. True, the decisions in this jurisdiction have been very insistent upon the position that, in order to constitute a valid gift of personal property *inter vivos*, there must be an actual or constructive delivery of the thing given with the present intent to pass the title to the donee. *Parker v. Mott*, 181 N. C., 435; *Thomas v. Houston*, 181 N. C., 91. But, considering the defendant's evidence in its most favorable light, the accepted position on a demurrer, we think the case should have been submitted to the jury. The test of a valid delivery, which will legalize a gift of personal property *inter vivos* and render it absolute, is such a transfer of the property, in conjunction with the donative intent, as will completely deprive the donor of his dominion over the thing given. *Cook v. Lum*, 55 N. J. L., 373. "To constitute a valid gift *inter vivos*, there must be an intention to give and a delivery to the donee, or to some one for him, of the property given." *Harris Banking Co. v. Miller*, 1 L. R. A. (N. S.), 790.

The evidence here upon the question of delivery is susceptible of more than one construction, and this makes it a question for the jury.

New trial.

L. D. GULLEY v. THOMAS RAYNOR.

(Filed 14 March, 1923.)

1. Verdict—Issues—Responsiveness—Landlord and Tenant.

In a landlord's action against his tenant to recover rent for his farm lands, the plaintiff took out claim and delivery for a bale of cotton the defendant had raised on the land, and the defense was a counterclaim for damages for the failure of the plaintiff to furnish sufficient fertilizer, etc., under the terms of the rental agreement, for the making of the crop. Upon the issues the jury failed to answer the one as to plaintiff's damage, and as to recovery on the defendant's counterclaim, "the bale of cotton in controversy": *Held*, the answer was not responsive to the issues or determinative of the rights of the parties, and the plaintiff is entitled to a new trial.

GULLEY *v.* RAYNOR.

2. Evidence — Conjecture— Damages—Crops—Fertilizer—Verdict—New Trials—Appeal and Error.

Where defendant tenant sets up a counterclaim for damages, in plaintiff's action to recover rent for farm lands, that plaintiff had failed in his obligation to furnish fertilizer, etc., under the contract of rental: *Held,* the defendant's evidence should be definite, in support of his counterclaim, as to the kind of fertilizer, weather, and other conditions that would affect the raising of the crop, etc., and his testimony otherwise, as to the crop he could have raised had the fertilizer, etc., been furnished, is purely conjectural, and insufficient to sustain a verdict in his favor.

APPEAL by plaintiff from *Allen, J.,* at November Term, 1922, of WAYNE.

Civil action, brought by a landlord against his tenant, to recover rents for the year 1920. At the institution of the action, there was a bale of cotton seized by the plaintiff under claim and delivery and replevied by the defendant.

The defendant set up a counterclaim, alleging that the plaintiff had failed to furnish him funds with which to buy fertilizers, seed beans, etc., as he had agreed to do, and in consequence of which his crops were greatly diminished, and he was damaged in a large sum.

The defendant was allowed to give the following testimony over objection of plaintiff:

"Q. If the plaintiff had furnished you sufficient fertilizer and seed beans to have planted the entire crop, how many bushels of beans would you have realized therefrom? A. About 60 bushels to the acre, or about 900 bushels, as I rented about 15 acres from Mr. Gulley.

"Q. If the plaintiff had furnished you fertilizer, how many bales of cotton would you have made? A. I would have made eight or nine bales of cotton."

The jury returned the following verdict:

"1. What amount, if any, is the defendant indebted to the plaintiff, L. D. Gulley? Answer:

"2. Is the plaintiff, L. D. Gulley, indebted to the defendant, Thomas Raynor; if so, in what amount? Answer: 'The bale of cotton in controversy.'"

Judgment was entered dismissing the action at the cost of the plaintiff and he appealed.

Hood & Hood and N. Y. Gulley for plaintiff.
No counsel for defendant.

STACY, J. It is quite evident from the verdict, as rendered by the jury, that instead of answering the issues submitted to them, they have undertaken, in their own way, to adjust the differences between the

parties, with the usual result in such cases, to wit, an insufficient verdict. *Tire Co. v. Motor Co.*, 181 N. C., 230. Material issues raised by the pleadings and supported by evidence, as in the case at bar, should be submitted to the jury, and, of course, answered by them. *McKenzie v. McKenzie*, 153 N. C., 242. As suggested in *Wilson v. R. R.*, 165 N. C., 499, we think his Honor should have sent the jury back with instructions to answer both issues before receiving the verdict. All the evidence tended to show that the rent had not been paid according to agreement, and that the defendant, if entitled to recover anything of the plaintiff, was remitted to his counterclaim for damages. In this, there was no allegation or evidence that the plaintiff owed him any cotton. A verdict ought to dispose of the matters in controversy, and nothing should be left to conjecture. *Falkner v. Pilcher*, 137 N. C., 449. There was more in dispute than the bale of cotton, but apparently this is all that is settled by the verdict.

But the defendant's evidence as to the amount and value of the additional crops he would have made had the plaintiff furnished him with funds to buy other fertilizers and seed beans, in the form as offered, is apparently more uncertain and less susceptible of accurate calculation by the jury than the evidence in any case heretofore reported. *Spencer v. Hamilton*, 113 N. C., 49; *Herring v. Armwood*, 130 N. C., 177; *Tomlinson v. Morgan*, 166 N. C., 557; *Carter v. McGill*, 168 N. C., 507; *S. c.*, 171 N. C., 775; *Perry v. Kime*, 169 N. C., 540. There is nothing to show what kind of fertilizers and seed beans the defendant could have purchased, nor is there any suggestion as to the conditions and circumstances under which he would have used them. It does not even appear that the defendant was in position to care for any additional crops, or that he was able properly to cultivate what he had. There must be some reasonable basis upon which the jury may estimate, with a fair degree of certainty, the probable loss sustained, or else they will be left in a field of doubt and speculation, in which case their verdict could be no more than mere guess work. This the law cannot sanction or condone. *Guano Co. v. Livestock Co.*, 168 N. C., 452; *Brewington v. Loughran*, 183 N. C., 558.

For the errors, as indicated, there must be another trial, and it is so ordered.

New trial.

IN RE WILL OF E. H. MEADOWS, DECEASED.

(Filed 14 March, 1923.)

1. Probate—Wills—Courts—Orders—Modification.

Courts having power to admit wills to probate may, in proper instances and on motion and due notice made and given in apt time, set aside the proof of a will in common form had before them, and recall letters of administration or other orders made in such proceedings, or modify them, when it is clearly made to appear that their adjudications or orders have been improvidently granted, or the court has been imposed upon or misled as to essential and true conditions existent in a given case.

2. Probate—Courts—Clerks of Court—Revocation of Letters—Wills—Widows—Dissent.

Where the clerk of the court has admitted a will to probate in common form, and the wife of the deceased has petitioned the clerk to set aside her letters of appointment as executrix therein in order that she may dissent from the will, with allegation and proof that she was at that time physically exhausted and consequently mentally incapable of understanding the consequences of her acts, and that she had acted under the direction of others: *Held*, the allegations and evidence, if proven, were sufficient for the clerk to revoke the letters he had issued to her.

3. Same—Appeal—Superior Courts.

Where the allegations of a petition by the widow are sufficient with supporting evidence to set aside letters of administration the clerk had issued to her upon admitting to probate the will of her husband in common form, and she has appealed from an order of the clerk adverse to her, rendered on the ground that she had not sufficiently established her allegations, it is incumbent on the judge to pass upon the controverted facts, and thereon render such judgment as it appears to him that justice and right require.

4. Same—Questions for Court—Jury.

Where the allegations and evidence are sufficient for the clerk of the Superior Court to annul letters of administration he has issued to the wife, in her petition therefor, in proceedings properly prosecuted, the clerk or the judge, on appeal, may impanel a jury to try the facts and aid the court in determining them; but the court may disregard the verdict and reach and establish its own conclusions thereon.

5. Probate—Courts—Letters of Administration—Revocation—Widows—Dissent—Arbitration—Estoppel.

Held, under the facts of this case, the widow was not estopped in her proceedings to have the clerk revoke letters of administration he had issued to her as executrix under the will of her deceased husband, by having submitted to arbitration a matter concerning personal property in controversy between her and her granddaughter, both claiming against the will.

6. Same—Appeal and Error.

In these proceedings, upon the petition of the widow to set aside letters testamentary issued to her by the clerk of the court, as executrix under

her deceased husband's will, which has been admitted to probate in common form, it appears that they were sufficiently broad to apply to and include the probate of the will, the qualification, and an agreement between the widow and her granddaughter to arbitrate, and the Superior Court judge, on appeal, was in error in failing to determine the facts, and in concluding that the widow was estopped as a matter of law by her agreement to arbitrate.

PETITION and motion, heard on appeal from the clerk of the Superior Court, before *Grady, J.*, at February Term, 1922, of CRAVEN.

The petition was filed in June, 1921, by Mrs. R. J. Meadows, widow of E. H. Meadows, deceased, before the clerk of the Superior Court, acting as probate judge of said county, to recall letters of administration, issued in part to petitioner and set aside the same as to her, with a view of enabling her to dissent from her husband's will and file her petition for dower and year's support, etc., as in case of intestacy.

In support of her petition her affidavit is filed to the effect that her husband died in said county on 21 January, 1921, leaving a last will and testament and appointing petitioner and two of his nephews as coexecutors of said estate. That on 24 January, 1921, on application, said will was duly admitted to probate and letters issued to the three executors named, and they were qualified pursuant thereto. That at the time of her said qualification, and for some time thereafter, from the continued and constant anxiety and strain from her husband's last illness, she was utterly broken down and mentally and physically incapable of attending to any business or of understanding the effect of what she was doing. That she signed papers as she was advised and instructed, but she did this mechanically, as she was told, and without knowing at the time what she was doing, and the effect of the same. That she did not know the contents and was not in a condition to consider or weigh any matter of business, etc.

These allegations were fully denied in opposing affidavits, and on the hearing before the clerk the motions were denied, he being of opinion that the petitioner's allegations of fact were not sustained. On appeal to the Superior Court a jury was impaneled as requested by petitioner, to determine the essential and pertinent facts, and pending the hearing, the court being of opinion that petitioner was estopped in her application by reason of having entered into an arbitration agreement of date 25 January, 1921, and an award pursuant thereto concerning the title and claim to certain property in dispute chiefly between the petitioner and a granddaughter of the testator, without otherwise considering the facts offered, and on account of the estoppel entered judgment that the petitioner was not entitled to renounce her office or to claim dower or year's allowance, and that said petition be dismissed at her costs. From this judgment, petitioner, having excepted, appealed.

Aydlett & Simpson and R. A. Nunn for petitioner.
Guion & Guion for respondents.
C. R. Pugh and Moore & Dunn for Mary Meadows Stratton, respondent.

HOKE, J. It is the approved practice in this jurisdiction that courts having power to admit wills to probate may, in proper instances and on motion and due notice made in apt time, set aside the proof of a will in common form had before them and recall letters of administration or other orders made in such proceedings, or modify same, where it is clearly made to appear that their adjudications and orders have been improvidently granted, or the court has been imposed upon or misled as to the essential and true conditions existent in a given case. The principle is referred to and to some extent considered in the recent case of *In re Johnson,* 182 N. C., 522-524, the Court citing for the position *Edwards v. Edwards,* 25 N. C., 82. It is also noted in that case that on such a motion and inquiry a jury trial is not allowed as of right, but the matters in dispute are properly dealt with as questions of fact by the court before which the action is pending, or to which it may be carried by appeal, citing *In re Battle,* 158 N. C., 388; *Taylor v. Carrow,* 156 N. C., 6; *Edwards v. Cobb,* 95 N. C., 5.

True, the court in such a case may, if it so desires, impanel a jury on the essential and pertinent questions presented, but like the disposition of feigned issues, in the old equity practice, the verdict is not necessarily controlling, but is to be regarded only as an aid to correct conclusion by the court, which may accept and act on or disregard it as it may deem best and right, the responsibility and ultimate decision of all pertinent matters being with the court. 2d Beach Modern Equity, sec. 666.

In the present case the clerk, after fully considering the petition and the affidavits offered in its support, has rejected the application, finding that the allegations are not supported by the evidence. On appeal, the court, without considering the evidence on the principal questions, has dismissed the petition, being of opinion that the petitioner is estopped by having entered into an arbitration agreement touching certain disputed matters involved in the inquiry, but we do not concur in this view. This alleged arbitration entered into on 25 January, the day after the will was admitted to probate, seems to concern chiefly certain personal property, the title to which was in dispute between the petitioner and Mrs. Stratton, a granddaughter of the testator, and as to which both are claiming, not under the will, but against it, and it does not sufficiently appear that either the agreement or the award should necessarily and as a conclusion of law operate as an estoppel in the matter. Apart from

this, a perusal of the record will disclose that the intestate died on 21 January. The will was admitted to probate on 24 January, and the arbitration agreement was entered into on 25 January, the next day, and both the allegations and the evidence offered by the petitioner are broad enough to include and apply to both the probate of the will, the qualification, and the agreement to arbitrate, and we are of opinion that this must be heard and considered by the appellate court.

We were cited by counsel for the appellee to a number of decisions of this Court to the effect that where a widow or other who has offered a will for probate and qualified as executrix thereunder and entered on the duties of her office, or knowingly taken property thereunder, may not afterwards be allowed to resign or to further dispute or question the validity of the will or the disposition of property made thereunder. See *McIntire v. Proctor*, 145 N. C., 288; *Tripp v. Nobles*, 136 N. C., 104; *Syme v. Badger*, 92 N. C., 712; *Mendenhall v. Mendenhall*, 53 N. C., 287. But in those cases it appears that the parties affected were clothed throughout in their right mind and in reasonable apprehension of what they were doing. In none of them was the question presented as it appears in this record, where there is a direct application to recall the letters issued to the petitioner and set aside her qualification, on allegations with supporting evidence that she was at the time mentally and physically disqualified from attending to the business in hand or having any intelligent concept of what she was about. See *In re Shuford's Will*, 164 N. C., 132, and cases cited.

We are, of course, making no comment on the truth or probability of petitioner's statement one way or the other. That is entirely a matter for the appellate court who may be called on to review the action of the clerk. But we are of opinion, as stated, that the evidence offered must be considered and the matter determined thereon as the right and justice of the case may require.

This will be certified that the judgment dismissing the petition be set aside and the cause further heard on the competent evidence offered.

Reversed.

J. T. EDWARDS AND WIFE ET AL. v. GEORGE E. SUTTON ET AL.

(Filed 14 March, 1923.)

Judgments—Consent—Tenants in Common—Commissioner to Sell Land—Division of Land — Interest — Equity — Judgment Set Aside—Procedure.

Where the action involves the validity of a deed given to an heir at law of the deceased owner of lands, and a division of his other lands among his heirs as tenants in common, and a consent judgment has been entered

establishing the validity of the deed and directing a division of the other lands to be made by the grantee heir at law, his report to have the effect of a decree of the court, all parties waiving the right to except: *Held*, upon exception to the report by one of the parties, that the division thus made was inequitable, and upon the finding of the judge that the one appointed was an interested party and had not made division of all of the lands, the consent judgment should be set aside *in toto*, in the exercise of the equitable jurisdiction of the court, and its order referring the matter to the clerk of the court to appoint commissioners to sell, and further proceedings to be had for the division according to the regular proceeding and practice of the court was a proper one.

STACY, J., concurs in result.

APPEAL by plaintiffs from *Lyon, J.*, at chambers.

N. G. Sutton died intestate 3 February, 1919, and this action was for the purpose of dividing his lands, and also to declare null and void certain deeds in possession of the defendant, George E. Sutton, which had been executed by N. G. Sutton and wife, but which it was alleged had never been delivered to the grantees therein named.

All the parties, whether plaintiff or defendant, were children of the said N. G. Sutton and tenants in common, subject to the dower interest of his widow, who was not joined as a party to the action, but came in later and signed the consent judgment which it is sought by this proceeding to have set aside.

When the case came on for trial at the June Term, 1921, of Lenoir, all the parties, including said widow, agreed upon a settlement and method of division of the lands of N. G. Sutton, the plaintiffs relinquishing the contention that certain deeds in the possession of George E. Sutton had never been delivered, and it was agreed that said George E. Sutton should be authorized to divide all the lands owned by N. G. Sutton at the time of his death which were not covered by the said deeds, the division to be made by George E. Sutton, one of the defendants, "according to his views of what is necessary to make an equal and equitable partition in value, so that the acreage assigned to each child by George E. Sutton, added to the lands conveyed to each of the children in said deeds, should constitute a fair and equitable partition of the lands of said N. G. Sutton, and with power in George E. Sutton to pay such sums as might be necessary to make such partition equitable out of the personal estate of N. G. Sutton, of which said George E. Sutton was administrator."

Under the terms of said consent judgment the said George E. Sutton was to report to the court in writing in 60 days from the adjournment of the June term, all of the parties "agreeing in advance to waive any right to file exceptions thereto, and agreeing that the report should be confirmed and entered as a decree of the court."

The said George E. Sutton did not file his report until 22 September, 1921. One of the defendants, L. A. Sutton, who is the appellee, filed a petition at October Term, 1921, of the Superior Court, alleging that the division of the lands as shown in the report of George E. Sutton was inequitable, and moved to set aside the report and requested the court to appoint three commissioners to divide the land. Affidavits were filed on both sides. The judge refused to set aside the judgment *in toto*, but held that the division of the lands as provided for in said judgment should be vacated for that certain of the lands of the late N. G. Sutton were not divided; and further, that the person designated under the consent judgment to make such division was interested in the subject-matter thereof, and adjudged that the partition be vacated and set aside and the proceedings be transferred to the clerk of the Superior Court with directions to appoint commissioners for that purpose. From this judgment all the parties, except L. A. Sutton, appealed.

Dawson & Wallace and Cooper, Whitaker & Allen for plaintiffs.
Ward & Ward for L. A. Sutton.

CLARK, C. J. This was a motion to set aside the consent judgment for the division of lands, in which judgment it was recited that it was agreed that certain deeds in the possession of George E. Sutton, which it is alleged had never been delivered by the intestate, should be accepted as valid.

The judge, while declining to set aside the consent judgment in full, held that the division of the lands as provided for in said judgment should be vacated for that all the lands of the late N. G. Sutton were not divided; and further, for that the person designated under the consent judgment to make such division was interested in the action and subject-matter thereof. There was also strong evidence before the court to show gross inequality in the partition, as reported. The report of George E. Sutton, appointed to make the partition, was not filed within the time specified by the consent judgment.

It is a well settled principle of law that no man should be a judge in his own case. *White v. Connelly*, 105 N. C., 69, and cases cited thereto in the Anno. Ed. For this reason, and because there had not been a complete division of all the lands, we think the judge was well within his equitable jurisdiction in setting aside the report of the referee and referring the matter to the clerk of the court to appoint commissioners and to proceed regularly for the division of the real estate in question.

As the judge finds that all the lands of the late N. G. Sutton have not been divided, it seems that it was proper also to set aside the agreement as to the deeds which it was alleged were in the possession of George E.

Sutton, and which had not been delivered by N. G. Sutton to the parties named therein. The two matters involved seem so intermingled that it was impracticable to set aside a part of the consent order without setting it aside *in toto*. Indeed, the appellants in their assignment of error allege that the court "could not in effect set aside a part of the consent judgment without setting aside the whole thereof."

Upon a review of the facts found, we think that the judgment should be modified by setting aside the whole of said judgment and directing a settlement of the matters in controversy according to the regular procedure and practice of the courts. The judgment, therefore, is thus

Modified and affirmed.

STACY, J., concurs in result.

JOHN E. FOWLER ET AL. V. J. B. WINDERS ET AL.

(Filed 14 March, 1923.)

1. Judgments—Consent—Modification—Courts—Interlocutory Orders.

The principle upon which the court may not modify a consent judgment entered with the approbation of the court, in the absence of fraud or mistake, applies to final judgments, and not to interlocutory orders entered by consent, when they do not infringe upon the rights of the parties.

2. Same.

Where there is a dispute between the parties as to the title and the rent one of them should pay to each of the others for a hotel, and a consent order has been entered that the tenant pay rent in a certain monthly amount to the receiver for the furnished hotel, and thereafter it is made to appear that by the legal action of one of the parties the tenant has been compelled to spend money for refurnishing the hotel: *Held*, the consent order was interlocutory, and a subsequent modification did not substantially affect the right of the parties, ordering that the tenant apply the rent money to his expenditures in refurnishing the hotel, and it was permissible for the court to enter it without the consent of the parties, upon requiring the renter to execute a sufficient bond to secure the final judgment.

APPEAL by plaintiffs from *Cranmer, J.*, at chambers in Kenansville, 15 December, 1922, from SAMPSON.

On 5 July, 1920, the plaintiffs, J. E. Fowler and P. F. Stevens, and the defendant J. B. Winders conveyed the hotel and lot in Clinton to the plaintiff F. H. Partrick for the sum of $20,000, one-third of which was paid in cash and notes given for the deferred payment secured by deed in trust to A. M. Graham, trustee, and duly recorded.

There being default in payment, Partrick and vendors reached an agreement whereby on 31 March, 1921, Partrick agreed to reconvey the same to said Fowler, Stevens, and Winders, and Partrick executed such deed of reconveyance to Fowler and Stevens, conveying to them a two-thirds undivided interest in said property and surrendered possession to them; but said J. B. Winders declined to accept reconveyance of his one-third interest. Said Fowler, Stevens, and Winders allege that they rented the said property and hotel building to the defendant W. L. Carleton at the price of $150 per month, agreeing, however, that $125 per month should be the rental until certain stipulated repairs were completed. Said repairs were completed about the last of July, 1922, but the defendant Carleton claims that he leased the premises from said Fowler, Stevens, and Winders for three years from and after 1 February, 1922, at the price of $125.

This action asks that the plaintiffs Fowler and Stevens and the defendant Winders be declared the owners of said property, free from any encumbrance by reason of the deed of trust, that said trustee Graham be directed to cancel the same, and that the note be canceled and surrendered to said Partrick. Further, that said lands and property be sold for a division by the said Fowler, Stevens, and Winders; that plaintiffs Fowler and Stevens recover of the defendant W. L. Carleton two-thirds of the monthly rental for said premises at the rate of $150 per month from 1 August, 1922, and for the appointment of a receiver to take charge of said premises and have a proper accounting.

M. E. Britt was appointed temporary receiver on 19 October, 1922. The sheriff was directed to put him in possession of the same, but not to disturb W. L. Carleton, the tenant, until his term was decided by a jury.

It was admitted that the defendant W. L. Carleton paid his rents from 1 February, 1922, to 1 August, 1922, at the rate of $125 per month, and made certain repairs, and that about 1 August, 1922, said Partrick, under claim and delivery, took possession of certain furniture in the hotel.

On 6 December, Cranmer, J., entered an order, which was consented to by all parties, that M. E. Britt should be made permanent receiver; that he should sell for cash certain personal property belonging to Fowler, Stevens, and Winders, to wit: certain brick, lumber, paints, etc., left over from the repairs on the hotel, and that the tenant, W. L. Carleton, pay into the clerk's office the rent then due at the rate of $125 per month, two-thirds of the same for the benefit of the plaintiffs Fowler and Stevens, who shall receive the same without prejudice, and that he continue to make such payments monthly and give a solvent bond to be approved by the clerk for such damages as may be recovered against him on account of the rental contract as may be found by the jury upon a final determination of the cause.

On 15 December, 1922, "after notice, and on motion of the defendant W. L. Carleton for modification of the order entered on 6 December, plaintiffs being represented by Henry E. Faison, attorney, and the defendant Carleton being represented by A. M. Graham, attorney, and it appearing to the court that, as contended by the defendant Carleton, he rented the property in question as a furnished hotel, and since the beginning of his term he has been dispossessed of certain furniture which was in the hotel at the time he rented the same, and that he has been compelled to buy other furniture in substitution for that taken from him under claim and delivery by T. H. Partrick, plaintiff, to the amount of $1,285, and it further appearing that the monthly rental for said furnished hotel was $125 per month; and it being further admitted that all rents have been paid in full until 31 July, 1922," it was ordered by the court that the order made 6 December, 1922, be modified by directing that the defendant Carleton, "in lieu of paying monthly rental to the receiver heretofore appointed, shall execute a good and sufficient bond with two sureties to be approved by the clerk of the court in the sum of $1,500, payable to the plaintiffs Fowler and Stevens on condition to be void if the defendant W. L. Carleton shall pay all rents which may be finally adjudged against him for the months intervening from 1 August, 1922, to the month of June, 1923; and beginning with the month of June, 1923, the defendant shall pay the monthly rental of $125 as provided in the former order of 6 December." From this order modifying the order of 6 December, 1922, the plaintiffs Stevens and Fowler excepted and appealed.

Henry E. Faison and B. H. Crumpler for plaintiffs.
A. M. Graham for defendants.

CLARK, C. J. The plaintiffs appealed upon the ground that the consent order could not be modified by the court.

This consent order was an interlocutory order in the cause, and has validity because of the approval of the judge, and was subject to modification by the judge like any other interlocutory order, provided it did not infringe upon the rights of the parties, which does not appear.

The principle that in the absence of fraud and mistake a consent judgment cannot be modified except by consent applies to final judgments; and, also, where a party has acquired rights in the final result which would be jeopardized by a change in the terms of such consent judgment. It has no application where, as in this case, there was an interlocutory judgment for the payment of the rent of a furnished hotel and by reason of the defendant being dispossessed of certain furniture by action of the plaintiffs there has been a material change in the status

of the defendant. Both parties being represented, the defendant was permitted to give surety, instead of paying over said rent, until the amount of the deferred rent should aggregate the amount expended in refurnishing the hotel.

The final judgment will determine the contention of the parties, and the acceptance of a bond in lieu of payment of the rents was an interlocutory matter which rested in the discretion of the judge upon the facts found by him as to the change in the status caused by the action of one of the plaintiffs in depriving the defendant of the furniture in the hotel pending the litigation.

Affirmed.

W. M. BUNN AND JOHN ANDERSON v. CHARLES F. DUNN.
W. C. REDDING ET UX. v. CHARLES F. DUNN.
CHARLES F. DUNN v. WILL LYNCH AND SULA LYNCH.

(Filed 14 March, 1923.)

Appeal and Error—Assignments of Error—Records—Briefs—Rules of Court—Dismissal.

Appellant is required to set out his assignments of error in the record, and discuss them in his brief, or they will not be considered by the Supreme Court on appeal, under the rules regulating appeals.

APPEALS by Charles F. Dunn from *Cranmer* and *Lyon, JJ.*, at August and November Terms, 1922, and January Special Term, 1923, of LENOIR.

Cowper, Whitaker & Allen for Bunn and Anderson.
Cowper, Whitaker & Allen for Redding and wife.
Dawson & Wallace for Lynch and wife.
Charles F. Dunn, in propria persona, for appellant.

STACY, J. On 1 August, 1922, W. M. Bunn and John Anderson commenced an action against Charles F. Dunn to have a certain alleged tax deed, issued to the defendant by the sheriff of Lenoir County, declared inoperative and void, and to remove same as a cloud on plaintiffs' title. Defendant filed answer, and at the August Term, 1922, he applied to the court for the appointment of a receiver to take charge of the premises, etc., upon the ground that the civil issue docket was congested and that the present case, in all probability, would not be reached for trial under about two years. His Honor, Cranmer, J., found that W. M. Bunn was amply solvent, and declined to appoint a receiver. From this order the defendant Charles F. Dunn appealed.

The record is silent as to when the case of *Charles F. Dunn v. William Lynch and Sula Lynch* was instituted; but at the October Term, 1922, the plaintiff therein, Charles F. Dunn, applied to the court for the appointment of a receiver upon the same grounds a similar application was made in the case of *Bunn and Anderson v. Dunn.* The motion was continued from the October Term to the November Term, 1922, at which time his Honor, Cranmer, J., found that the appointment of a receiver was unnecessary, and hence declined the application. From this order the plaintiff Charles F. Dunn appealed.

On 16 June, 1921, W. C. Redding and wife, Marcidie Redding, commenced an action against Charles F. Dunn to have a certain alleged tax deed, issued to the defendant by the sheriff of Lenoir County, declared inoperative and void, and to remove same as a cloud on plaintiffs' title. This cause came on for hearing before his Honor, Lyon, J., at the January Special Term, 1923, and was submitted on an agreed statement of facts. Upon the facts agreed, his Honor found that the defendant's tax deed was void and of no effect. Judgment was rendered for the plaintiffs. The defendant Charles F. Dunn gave notice of appeal.

Charles F. Dunn, representing himself, and wishing to appeal in these three cases from orders and judgments rendered by the Superior Court of Lenoir County, has docketed here a single record containing the pleadings, orders, judgments, and affidavits in all three cases; and, in the same record, three briefs have been inserted by the appellant. There are no assignments of error appearing on the record, and no exceptions are discussed in the briefs. In the case of *Bunn and Anderson v. Dunn* there is no proper statement of case on appeal. In each of the others it was adjudged that the record proper should constitute the statement of case on appeal.

On motion of appellees, we are compelled to dismiss the appeal in each case for noncompliance with the rules. The irregularities are too patent to admit of discussion.

Appeal dismissed.

GREENSBORO MORRIS PLAN COMPANY AND HARE'S MOTORS OF CAROLINAS, INC., v. J. I. PALMER AND C. S. PALMER, GUARDIAN AD LITEM OF J. I. PALMER.

(Filed 14 March, 1923.)

1. Infants—Contracts—Disaffirmance—Void Contracts.

Concerning personal property, and excluding contracts for necessaries and such contracts as a minor is authorized by statute to make, an infant may during his minority avoid his contracts, and such avoidance, when effected, is irrevocable and renders the contract void *ab initio.*

2. Same—Torts—Misrepresentations as to Age—Fraud and Deceit.

The principle upon which an infant may avoid his executory contract rests upon the policy of the law to protect him during his minority from designing persons, etc., and his right to a disaffirmance, though frequently it may be injurious to the other contracting party, is not affected by the fact that he had misrepresented his age, or appeared in maturity to have reached the age of discretion, and relying thereon the other party had entered into the contract he has disaffirmed.

3. Same—Damages.

While an infant may be held responsible in damages for a pure tort unconnected with a contract upon which the law does not render him liable, it is otherwise when he disaffirms a contract of this character, which the policy of the law permits him to disaffirm.

4. Same—Actions—Form of Action.

Where the damages sought in the action are based upon an executory contract of an infant concerning which it is the policy of the law to render void upon his disaffirmance, the form of the action in alleging the tort of the infant in inducing the other contracting party to enter into the contract by misrepresenting he was of full age, is ineffectual to produce a different result.

5. Same—Benefits Retained—Vendor and Purchaser—Consideration Paid.

Where a minor has purchased an automobile truck, paid partly for it, mortgaged it to obtain part of the purchase price, and given his notes to the seller secured by chattel mortgage for the balance, and the truck has been seized and sold under the liens: *Held*, the principle which forbids the minor to retain a benefit from his contract after disaffirmance applies, but he may recover the part payment he has made to the purchaser, including that borrowed for the purpose; and the fact that he has received and spent money he has earned in the operation of the truck does not affect the result.

STACY, J., dissenting.

APPEAL by plaintiffs from *Harding, J.*, at September Term, 1922, of GUILFORD.

The plaintiffs brought suit to recover $1,308 as damages for false representation and deceit. They alleged that on 19 July, 1920, the defendant J. I. Palmer was only nineteen years old, but had the appearance of a man of full age, and was emancipated and married; that at that time he was engaged in the business of hauling lumber and falsely represented to them that he was over twenty-one, by means of which he deceived them and induced them to sell him a truck at the price of $3,014.32, to secure which he executed his note and chattel mortgage on the truck. It is admitted that he paid the Hare's Motors $1,016.91 and the Greensboro Morris Plan $1,006.32, and that under proceedings in claim and delivery the truck was seized and sold by the plaintiffs for $700. The plaintiffs further alleged that of the payments made $1,223.23 was money made by using the truck. The defendant for the purpose of

his motion for judgment did not deny that he was a minor, or that he made the alleged false representation. He moved for judgment upon the pleadings, and Judge Harding held that the plaintiffs could not recover either on contract or in tort, and adjudged that the plaintiffs should take nothing by their action, and that the defendant should recover of the Hare's Motors $1,016.91 and from the Morris Plan Company $1,006.32, with interest on such sums from 1 December, 1920. The plaintiffs excepted and appealed.

Brooks, Hines & Smith and B. D. McCubbins for plaintiffs.
Shuping, Hobbs & Davis for defendant.

ADAMS, J. It may be remarked in the beginning that the controversy is not concerned with real estate, and that in this jurisdiction the law has been declared with respect to an infant's right to avoid his contract relating to personal property. Omitting reference to contracts for necessaries, and to such contracts as a minor is authorized by statute to make, the Court has held that an infant may, during his minority, avoid his contract relating to personal property, and that such avoidance, when effected, is irrevocable and renders the contract null and void *ab initio*. *Pippen v. Ins. Co.*, 130 N. C., 23; *Norwood v. Lassiter*, 132 N. C., 56; *Austin v. Stewart*, 126 N. C., 525; *S. v. Howard*, 88 N. C., 651; *Devries v. Maxwell*, 66 N. C., 45; *S. c.*, 68 N. C., 401; *Hislop v. Hoover*, 68 N. C., 141; *Freeman v. Bridger*, 49 N. C., 1; *Francis v. Felmit*, 20 N. C., 637; *Chandler v. Jones*, 172 N. C., 569.

This doctrine seems to be established. It is approved and maintained with practical unanimity, and while the infant's right to disaffirm his contract may sometimes be exercised to the injury of the other party, the right nevertheless exists for the protection of the infant against his own improvidence, and may be exercised entirely in his discretion. 1 Elliott on Contracts, sec. 302; 3 Page on Contracts, sec. 1593; *Dibble v. Jones*, 58 N. C., 389. And fraud is not a bar to the exercise of the infant's right to disaffirm. Indeed, it is generally held that if an infant is sued on his contract, his fraud in procuring the execution of the contract will not prevent his disaffirmance, or, as stated by *Judge Cooley*, "All the cases agreed that if an infant is sued on his contract, his fraud will not preclude his relying upon his infancy as a defense in that suit." 1 Cooley on Torts, 188 n; *Kirkham v. Wheeler-Osgood Co.*, 14 Ann. Cas., 535 n; *Rosa v. Nichols*, 6 A. L. R., 413 n; *Loan Assn. v. Black*, 119 N. C., 323.

But an infant is liable for his torts. There can now be no doubt as to his liability for the commission of a pure tort—a *"tort simpliciter"*—

which is disconnected with contract. *Moore v. Horne*, 153 N. C., 415; *Kron v. Smith*, 96 N. C., 393; *Crump v. McKay*, 53 N. C., 35. There is authority to the effect that if the tort be connected with his contract, the question of his liability may be resolved by the time at which the tort is committed, or by the relation which the wrong sustains to the subject-matter of the agreement, or by the question whether the contract is substantially the ground of the action. For example, it is the generally accepted view that infancy is a defense to an action for false representation as to anything which is essentially the subject-matter of the contract. This principle is applied in *Fitts v. Hall*, 9 N. H., 441, one of the cases on which the plaintiffs rely, in which *Parker, C. J.*, said: "If the tort or fraud of an infant arises from a breach of contract, although there may have been false representations or concealment respecting the subject-matter of it, the infant cannot be charged for this breach of his promise or contract, by a change of the form of action. But if the tort is subsequent to the contract, and not a mere breach of it, but a distinct, willful, and positive wrong of itself, then, although it may be connected with a contract, the infant is liable."

The difficulty frequently encountered is in the practical application of these principles, for the courts are not in accord as to when the alleged tort is independent of or is essentially connected with the contract, or when the contract is the substantial basis of the action. This, perhaps, is the chief cause of the marked difference of opinion expressed in the decisions of various jurisdictions in this country. To reconcile the conflict of opinion is impossible, and we must determine the question presented in the appeal by adhering to the principles which in our judgment are consonant with the policy outlined in former decisions and with the fundamental principles of the law affecting contracts made by those of immature years.

The first decisions on the question before us were rendered in the reign of Charles II. In 1665 the English rule was established in *Johnson v. Pye*, 1 Lev., 169; 1 Keb., 913; 83 Eng. Rep., 353, 1312, 1317; Sid., pt. 1, p. 258. Following is the case as reported: "The defendant affirms to the plaintiff that he was of full age, on which the plaintiff lends him the money. And he takes his security (a mortgage) when in truth he was only twenty and a half. Then he avoids his security. And a difference was taken between torts and contracts of infants, for though infants will not be bound for contracts, yet they will be bound for torts. But though infants will be bound for actual torts, as trespass, etc., which are *vi et contra pacem*, yet they will not be bound by those which sound in deceit, for if they should be, all the infants in England would be ruined. And according to Keble, *Keeling, J.*, said: 'Such torts that must punish an infant must be *vi et armis*, or notoriously

against the publick; but here the plaintiff's own credulity hath betrayed him.' And *Windham, J.*, said: 'The commands of an infant are void; and for such he shall never be attainted a disseisor; much less shall he be punished for a bare affirmation. . . . Also, by this means all the pleas of infancy would be taken away, for such affirmations are in every contract.'" 57 L. R. A., 675.

This decision has been vigorously assailed on the ground that it is dubious, and that the disposition of the case is uncertain; but in England it has withstood all assaults and "has been stolidly followed again and again as the highest authority, and it is now firmly established in that country as law that an infant is not liable at law for his deceit in inducing a contract." 57 L. R. A., 675 n.

It is in this country that the confusion has arisen. Here the decisions are in hopeless conflict. In the summary of the note just cited it is said that the weight of authority here is against the English rule, but Cooley says that the tendency here is with the English cases. 1 Cooley on Torts, 186. Perhaps nowhere has the decision in *Johnson v. Pye* been criticised with more force and clearness than in two of the cases cited in the plaintiffs' brief. In *Fitts v. Hall,* 9 N. H., 741, *Parker, C. J.*, said: "The next question is whether this action can be maintained against the defendant for the fraudulent representation that he was of age, by reason of which the plaintiff was induced to sell him the hats, on a credit, and to take his note. . . . If infancy is not permitted to protect fraudulent acts, and infants are liable in actions *ex delicto,* whether founded on positive wrongs or constructive torts or frauds (2 Kent, 197), as for slander (Noy's Rep., 129, *Hodsman v. Grissel*), and goods converted (auth. *ante*), there is no sound reason that occurs to us why an infant should not be chargeable in damages for a fraudulent misrepresentation, whereby another has received damage. . . . But the representation in *Johnson v. Pye,* and in the present case, that the defendant was of full age, was not part of the contract, nor did it grow out of the contract, or in any way result from it. It is not any part of its terms, nor was it the consideration upon which the contract was founded. No contract was made about the defendant's age. The sale of the goods was not a consideration for this affirmation or representation. The representation was not a foundation for an action of *assumpsit.* The matter arises purely *ex delicto.* The fraud was intended to induce, and did induce, the plaintiff to make a contract for the sale of the hats, but that by no means makes it part and parcel of the contract. It was antecedent to the contract; and if an infant is liable for a positive wrong connected with a contract, but arising after the contract has been made, he may well be answerable for one committed before the contract was entered into, although it may have led to the contract."

And in *Rice v. Boyer*, 108 Ind., 472, *Elliott, C. J.*, uses this language: "It is evident from this brief reference to the authorities that it is not easy to extract a principle that will supply satisfactory reasons for the solution of the difficulty here presented. It is to be expected that we should find, as we do, stubborn conflict in the authorities as to the question here directly presented, namely, whether an action will lie against an infant for falsely representing himself to be of full age. . . . Our judgment, however, is that where the infant does fraudulently and falsely represent that he is of full age, he is liable in an action *ex delicto* for the injury resulting from his tort. This result does not involve a violation of the principle that an infant is not liable where the consequence would be an indirect enforcement of his contract, for the recovery is not upon the contract, as that is treated as of no effect; nor is he made to pay the contract price of the article purchased by him, as he is only held to answer for the actual loss caused by his fraud. In holding him responsible for the consequences of his wrong, an equitable conclusion is reached, and one which strictly harmonizes with the general doctrine that an infant is liable for his torts. Nor does our conclusion invalidate the doctrine that an infant has no power to deny his disability, for it concedes this, but affirms that he must answer for his positive fraud."

In this opinion the *Chief Justice* further said that the attempt to discriminate between pure torts and torts connected with contracts is not satisfactory, and that it is scarcely possible to conceive a tort not in some way connected with contract. "It seems to us," he asserts, "that the only logical and defensible conclusion is that he is liable to the extent of the loss actually sustained for his tort, where a recovery can be had without giving effect to his contract. The test, and the only satisfactory test, is supplied by the answer to the question: Can the infant be held liable without directly or indirectly enforcing his promise? There is no enforcement of a promise where an infant who has been guilty of a positive fraud is made to answer for the actual loss his wrong has caused to one who has dealt with him in good faith and has exercised due diligence. Nor does such a rule open the way for a designing man to take advantage of an infant, for it holds him to the exercise of good faith and reasonable diligence, and does not enable him to make any profit out of the transaction with the infant, because it allows him compensation only for the actual loss sustained. It does not permit him to make any profit out of an executory contract, but it simply makes good his actual loss."

These decisions are followed by several courts and by others are combatted and rejected as unsound. It is insisted by the latter that it is not difficult to conceive of torts which are entirely disconnected with any contract, and that the inevitable result of applying the decisions referred

to is indirectly to enforce the infant's contract, and thereby repudiate the doctrine almost universally adhered to that an infant may disaffirm and avoid his contract. This position is supported by eminent authority.

In *Slayton v. Barry,* 175 Mass., 513, the plaintiff brought suit to recover damages for a sale of goods induced by an infant's false representation as to his age. Denying the alleged right to recover, the Court said: "The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this Court. *Merriam v. Cunningham,* 11 Cush., 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. *Johnson v. Pie,* 1 Lev., 169; 1 Sid., 258; 1 Keble, 905; *Grove v. Nevill,* 1 Keble, 778; *Jennings v. Rundall,* 8 T. R., 335; *Green v. Greenbank,* 2 Marsh., 485; *Price v. Hewett,* 8 Exch., 146; *Wright v. Leonard,* 11 C. B. (N. S.), 258; *De Roo v. Foster,* 12 C. B. (N. S.), 272; *Gilson v. Spear,* 38 Vt., 311; 88 Am. Dec., 659; *Nash v. Jewett,* 61 Vt., 501; 4 L. R. A., 561; 18 Atl., 47; *Ferguson v. Bobo,* 54 Miss., 121; *Brown v. Dunham,* 1 Root, 272; *Geer v. Hovy,* 1 Root, 179; *Wilt v. Welsh,* 6 Watts, 9; *Burns v. Hill,* 19 Ga., 22; *Kilgore v. Jordan,* 17 Tex., 341; Benjamin, Sales (6 ed.), 23; Cooley, Torts (2 ed.), 126; 2 Addison, Torts, par. 1314. See *contra, Fitts v. Hall,* 9 N. H., 441; *Eaton v. Hill,* 50 N. H., 235; 9 Am. Rep., 189; *Hall v. Butterfield,* 59 N. H., 354; 47 Am. Rep., 209; *Rice v. Boyer,* 108 Ind., 472; 58 Am. Rep., 53; 9 N. E., 420; *Wallace v. Morss,* 5 Hill, 391.

"The general rule is, of course, that infants are liable for their torts. *Sikes v. Johnson,* 16 Mass., 389; *Homer v. Thwing,* 3 Pick., 492; *Shaw v. Coffin,* 58 Me., 254; 4 Am. Rep., 290; *Vasse v. Smith,* 6 Cranch, 226; 3 L. Ed., 207. But the rule is not an unlimited one. It is to be applied with due regard to the other equally well settled rule, that, with certain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts, but of protection from their contracts. The true rule seems to us to be as stated in *Liverpool Adelphi Loan Asso. v. Fairhurst,* 9 Exch., 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely: If the fraud 'is directly connected with the contract, . . . and is the means of effecting it, and parcel of the same transaction,' then the infant will not be liable in tort. The rule is stated in 2 Kent Com. (8 ed.), par. 241, as follows: 'The fraudulent act, to charge him (the infant), must be wholly tortious; and a matter arising *ex contractu,* though infected with fraud, cannot be changed into a tort in order to

charge the infant in trover or case by a change in the form of the action.'

"In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract, and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question."

In a similar case the Supreme Court of Vermont reached the same conclusion, *Tyler, J.*, saying: "While it is true, as a general proposition of law, that infants are liable for their torts, yet the form of action does not determine their liability, and they cannot be made liable when the cause of action arises from a contract, although the form is *ex delicto*. A reference to the declaration in the case shows that the representations made by the defendant as to his age, using the concise language of *Chief Justice Pierpont* in *Doran v. Smith, supra*, 'enter into and constitute an element of the contract itself; it is that that makes them actionable. The contract must be alleged and proved or there can be no recovery. The contract is the basis of the action. The fraud is predicated upon the contract.' "

Likewise, in *Mon. Build. Asso. v. Herman*, 33 Md., 133, the Court said: "But it has also been urged that the infants were guilty of fraud, and are, therefore, precluded from the benefit of their infancy. Whilst infants are protected against contracts, other than for necessaries, it is undoubtedly true that they are liable for torts and injuries, infancy being a shield and not a sword, it does not afford a shelter for fraudulent acts. If the infant disaffirm an executed contract, and the specific consideration can be restored, in whole or in part, the infant is treated as a trustee of the other party, and must give it up; but where the articles received by him are consumed or the money spent, the party advancing them is without remedy.

"In actions *ex delicto* arising from wrongs, as trespass, or assault, or constructive torts, or frauds, infants are liable; but the fraudulent act, to charge them, must be wholly tortious, for if *ex contractu*, though fraudulent, it cannot be changed into a tort to make them answer in trover or case. If the infant, without any contract, willfully takes away the goods of another, trover lies, because it is a fraudulent trespass.

"Where he affirms himself to be of age, and borrows money, and gives his obligation for it, and avoids it by reason of his nonage, no action lies against him for the deceit, because, though liable for actual torts or trespass, etc., which are *vi et armis*, yet he is not bound for the action sounding in deceit."

It would be useless to multiply such excerpts. The cases cited are fairly representative of the divergence of judicial opinion as to the liability of an infant for fraud in inducing the execution of a contract which he afterwards disaffirms. As the specific question has not been determined in this jurisdiction, we are confronted with the necessity of deciding, as suggested, which of the two opposing doctrines is the more nearly in accord with the general law of infancy and the former decisions of this Court.

It should be noted particularly that the plaintiffs filed two complaints. In the first they set up the execution of the note and mortgage, the defendant's default in payment, the seizure and sale of the truck, and the balance due, and sought to recover the amount of such balance and to be declared entitled to the possession of the truck. In the amended complaint they inserted an allegation of deceit and prayed judgment for the exact amount of the indebtedness as "damages" for the fraud. In other words, they brought suit to recover judgment for $1,308 as the remainder "due and owing on the note and mortgage," and then, discovering that they could not sustain this action on the note, amended the complaint by setting up a tort and praying the recovery of the identical amount which they call "damages." Yet it is said in behalf of the defendants that this action is based on the tort of deceit, and that the measure of damages is different from what it is in an action founded on contract. If this is correct, why did the plaintiff demand judgment for $1,308 first in contract and then in tort? The answer is obvious. The alleged deceit *per se* was not actionable; it was necessary to show loss, and loss could be shown only by proving a breach of the contract; the breach, therefore, was the direct cause of the loss, even if the deceit induced the execution of the contract. Stripped of disguise, then, the manifest purpose of the action is to collect the unpaid balance of the note by transforming an action on contract into an action in tort. Only this and nothing more. But such transformation this Court has declined to permit. In *Barnes v. Harris,* 44 N. C., 16, *Nash, C. J.,* observed that although an infant cannot be sued upon his contract, except for necessaries, and is liable in damages for a mere tort, a person cannot merely by changing his form of action charge him for a breach of contract. See, also, *Poe v. Horne, ibid.,* 398. And in *Scott v. Battle,* 85 N. C., 191, *Judge Ruffin* remarked: "Upon principle, too, it seems impossible to conceive that the law will ever permit that to be done indirectly which it forbids to be done directly." *Chief Justice Gibson* was equally emphatic in disapproving this tendency. His language is this: "The theory on which a breach of contract has been thus turned into a trespass is as incomprehensible to me as the theory on which a common recovery bars an entail; and why we should employ any juggle whatever to tear from an infant the

defenses with which the law has covered his weakness is equally incomprehensible. In the American courts the hardship of particular cases, as in the earlier decisions on the statute of limitations, seems to have run away with the law; but it is to be remembered that particular hardships are to be borne in giving effect to every general principal of policy. To fritter away the rule by exceptions such as these would expose a child of the most tender years to an action for the destruction of a delicate or dangerous instrument thoughtlessly or wickedly put into his hands; for, in contemplation of law, an infant of three years is not inferior in discretion to one of twenty. The mischiefs to which minors are exposed from the cupidity of those whose trade it is to pamper their appetites, are sufficiently depicted in *Penrose v. Curren:* and we are not disposed to surrender the principle asserted in it." *Wilt v. Welsh*, 6 Watts (Pa.), p. 13.

The necessary deduction is that the defendant's alleged deceit is not an estoppel against his disaffirmance of the contract. The principle is stated by *Avery, J.*, in *Loan Association v. Black, supra:* "We have discussed the exceptions upon the theory that the plaintiff set up the fraud in pleadings by way of estoppel, though there seems to be some dispute as to whether the amendment to the replication relating to the infancy of the *feme* defendant was ever allowed by the court. The plaintiff contends that, apart from the effect of coverture upon the validity of her promises and deeds, the female defendant was estopped as an infant from avoiding and repudiating the obligation of those instruments because she misled the plaintiff by the representation that she was twenty-one years old. It is a principle as old as the common law that agreements or attempted contracts of infants are voidable at the option of the infant on attaining his majority. It is expressly found here that there was no ratification, if such a thing had been possible where the double disability existed. But it is insisted that because she obtained money by false representations as to her age she was estopped from denying her obligation to pay. If the courts should sanction this doctrine, the result would be that the ancient rule, established as a safeguard to protect infants from the wiles of designing rascals, would be abrogated, and the way opened up to reckless youths to evade the law by lying. The courts would thereby put a premium upon falsehood and hold out the temptation to infants, and to others who hope to profit by debauching them, to resort to this disreputable method of enabling the one to squander and the other to extort the patrimony intended to prepare a child for future usefulness."

The defendant's disaffirmance rendered the contract absolutely void, and he is neither required to account for the use of the truck nor prevented from recovering the amount he has paid on the note and mort-

gage. Of course, he cannot retain any property acquired by the contract, but the truck has been sold and the proceeds retained by the plaintiffs. *Skinner v. Maxwell, supra; Devries v. Summit, supra; Hodge v. Powell,* 96 N. C., 70; *Walker v. Brooks,* 99 N. C., 207; *Draper v. Allen,* 114 N. C., 50; *Millsaps v. Estes,* 137 N. C., 545; *Englebert v. Pritchett,* 26 L. R. A. (Neb.), 177, and note; *Wuller v. Grocery Co.,* 16 Ann. Cas. (Ill.), 522, and note; *Gillis v. Goodwin,* 180 Mass., 140.

We have not overlooked the argument as to the effect of the defendant's disaffirmance of his contract, but the loss suffered by the plaintiff will not justify our disregard of established principles in the law of contract. Transactions founded in the utmost good faith often go awry and result in financial loss; but in the disposition of such questions we should remember the homely but forceful aphorism that "the hard cases are the quicksands of the law." We find no error in his Honor's judgment.

Affirmed.

STACY, J., dissenting: I recognize the force of the argument that the dominant purpose of the law in permitting infants to disaffirm their contracts is to protect children and those of tender years from their own improvidence, or want of discretion, and from the wiles of designing men. But when this right is used to relieve minors from their liability for torts and deliberate wrongs, the very protection which was intended as a shield to them becomes a sword in their hands. Jealous as the law may be of the rights of infants, it seems to me that in the case at bar this solicitude has reached the stage of "a vaulting ambition which o'erleaps itself and falls on t'other side."

Fraud will vitiate any contract at the election of the party defrauded. *Van Gilder v. Bullen,* 159 N. C., 291. Here the plaintiff has elected to rescind the contract and to treat it as a nullity. With the agreement out of the way, what is to bar the plaintiff from proceeding in an action *ex delicto?* The suit is not to enforce the contract; it is alleged that there is none. The action is based upon the tort of deceit. The measure of damages is different from what it would be in an action founded on contract. The plaintiff is not entitled to recover the purchase price of the machine or the balance due under the contract, for the infant may have agreed to pay too much. The plaintiff is limited in its recovery to what it has actually lost. *Burley v. Russell,* 10 N. H., 184; 34 Am. Dec., 146. See, also, *Food Co. v. Elliott,* 151 N. C., 396. This is not undertaking to do by indirection what the law forbids from being done directly. There is no effort to enforce the contract, but the plaintiff's suit is to recover damages in an action sounding in tort. See note, 57 L. R. A., p. 675.

The authorities elsewhere are in hopeless conflict. They are fairly marshaled in the opinion of the Court. I am content to place my dissent upon the reasons there assigned, and upon the additional reasons which have just been given. Without regard to the weight of authority—which seems to be in doubt—I hold it to be a sound principle of law, certainly approved in morals, that an infant who obtains my property by deceit injures me no less than the infant who negligently destroys that which is mine. If he be liable in the latter case, where the heart is free from guilt, why should he not be required to answer in the former, where forsooth his moral turpitude makes the injury more reprehensible on his part if not more grievous to me? The absence of a contract in the one case and its existence in the other is not a sufficient reason for the difference. *Wallace v. Morss*, 5 Hill, 391. A contract induced by fraud may be rescinded and treated as a nullity by the injured party; and, where this is done, it no longer exists as a shield for the infant defendant. The plaintiff should not be deprived of the right to rescind a fraudulent contract and sue for damages simply because the one who practiced the fraud is a minor. This would not be making the contract the substantial basis of the action, but it would be in fact a distinct rescission of the contract and an election to sue in tort.

Daly, F. J., in *Eckstein v. Frank*, 1 Daly, 334 (citing in support authorities from New Hampshire, Massachusetts, Vermont, United States Supreme Court, Texas, South Carolina, and Maine), states the law of New York as follows: "When an infant obtains property by falsely representing himself to be of full age, an action of tort may be maintained against him, either to recover it back or to recover damages, upon the ground that he obtained the possession of it wrongfully. It has long been the rule in courts of equity that an infant will be held liable where he obtains property by a false representation respecting his age. 'If an infant is old and cunning enough,' says *Lord Chancellor Cowper*, 'to contrive and carry out a fraud, he ought to make satisfaction for it' (2 Eq. Ca. Ab., 515), and the good sense and justice of requiring him to do so has been held in the numerous cases cited to be as applicable in a court of law as in a court of equity."

The decision in *Loan Assn. v. Black*, 119 N. C., 323, is not at variance with this position, for there the suit was brought to recover on contract.

CLARK, C. J., concurs in dissent.

W. M. FOX, ADMINISTRATOR, v. VOLUNTEER STATE LIFE INSURANCE COMPANY.

(Filed 14 March, 1923.)

1. Insurance—Actions—Parties.

The administrator of the deceased insured is the proper party to bring an action upon contract of insurance making the policy payable to the personal representatives.

2. Insurance—Principal and Agent—Torts—Delivery of Policy.

Where the authorized agent of a life insurance company to deliver a policy could have delivered the same during the good health of the applicant, and delays to do so until the applicant is in ill health, and then not entitled to its delivery under his agreement, except for the delay: *Held*, it is for the jury to determine whether it was the unreasonable delay of the insurer's agent that prevented the delivery of the policy during the continued good health of the applicant, and, if so, the insurer was liable to the beneficiaries of the deceased applicant upon the tort of its authorized agent.

3. Same—Premiums—Stipulations—Waiver.

The rules of an insurance company required the prepayment of the premium on a life insurance policy, and provided that upon the acceptance of the applicant by the medical examiner at the head office of the company the policy would be in force. The local agent agreed with the insured that the payment was to be on delivery to him of the policy, upon the same condition, of which change the home office must have had knowledge when it sent the policy to the local agent for delivery: *Held*, the stipulation as to the prepayment of the premium was in favor of the insurer, which it had waived by its conduct.

4. Insurance—Principal and Agent—Soliciting Agent—Agent for Delivery—Statutes.

The soliciting agent of a life insurance company, who is also charged with the duty to deliver the policy to the applicant, is the agent of the company, and makes it liable for its agent's tort in failing to deliver it within a reasonable time after its receipt by him from his principal for that purpose. C. S., 6457.

5. Insurance—Principal and Agent—Delay in Delivering Policy—Torts—Questions for Jury—Trials.

Where a policy of life insurance was to become effective upon the delivery by the local agent to the applicant while he was in continued good health, and after the receipt of the policy by the accredited agent from the home office, the insured has demanded the delivery of the policy and tendered payment of the premium in accordance with the terms of the contract, and the tender has been kept good, the beneficiaries, after the death of the insured, may recover of the insurer the face value of the policy upon the tort of the agent in failing to deliver the policy within a reasonable time, which is for the jury to determine.

6. Same—Contracts—Consideration—Actions.

Where a policy of life insurance would have been delivered to the applicant before his death, and have become binding on the company except for the tort of its agent in failing to deliver it within a reasonable time, the action of the beneficiaries after the death of the applicant will not fail on the ground that there was a want of consideration.

WALKER and ADAMS, JJ., concurring; STACY, J., dissenting.

APPEAL by plaintiff from *Shaw, J.*, at April Term, 1922, of MADISON.

This was an action to recover the sum of $3,000 on account of the alleged wrongful and negligent failure of defendant's agent to make delivery of the policy of insurance issued by defendant to plaintiff in accordance with agreement between them. When the application was taken it was stipulated that the premium would be paid on the delivery of the policy.

The application was received in the home office of defendant in Chattanooga, Tenn., on 7 June, 1921, and was duly approved and accepted, and on 15 June, 1921, the policy was issued and sent to Charles Buckner, the local agent at Mars Hill, N. C., for delivery to the plaintiff's intestate. The said Charles Buckner was soliciting agent for the defendant, and it was a part of his duty to deliver policies of insurance.

It is admitted that plaintiff's intestate was in good health at the time he made application for insurance, and the evidence is undenied that such good health continued for about 2 weeks after the policy was received by the agent for delivery; that plaintiff's intestate first became ill on 2 July, 1921, and developed typhoid fever, which caused his death on 14 July, 1921. He was a strong, healthy man, and in good health up to 1 July. He was engaged in hauling tan bark and hauled the last load on 3 July.

The agent took the policy to the home of the plaintiff's intestate on 6 July, 1921, and finding that plaintiff's intestate was sick at that time, did not leave the policy, but promised to return with it later in the day. A tender of the premium was then made, and the delivery of the policy demanded. At that time the agent said: "I ought to have delivered this policy some time ago. I have had this policy on hand something like two weeks or over." The agent also stated that he met plaintiff's intestate after the policy was received for delivery, and that plaintiff's intestate told him that he had the money to pay the premium, and requested agent to make delivery of the policy, and that he neglected to make delivery because he waited for other policies, and for a Mr. Hyder, who was to make the trip with him. The agent and plaintiff's intestate lived at and a few miles from Mars Hill, respectively.

At the time the defendant sent the policy to its agent for delivery to the plaintiff's intestate, the policy was enclosed in an envelope on which

was stamped, "You are now a policy holder in the *Volunteer State Life Insurance Company at Chattanooga, Tenn.*"

When the plaintiff rested his case the defendant moved for a nonsuit, which was allowed, and the plaintiff excepted and appealed.

Mark W. Brown for plaintiff.
Martin, Rollins & Wright for defendant.

CLARK, C. J. The policy of insurance in this case was issued in favor of the executor or administrator, the application was signed by plaintiff's intestate, and the plaintiff, as his administrator, was the proper party to bring the action. C. S., 159.

This is not an action upon the policy itself, which was not delivered, but upon the wrongful act or negligence of the defendant company through its agent to deliver the policy in accordance with the agreement entered into with the intestate.

It is true that if it had been stipulated in the application for this policy that the insurance applied for should not take effect until 60 days thereafter, and then only upon the applicant's continued health, the insurance company would have incurred no liability had the applicant died during the 60-day period. The difference between that case and the present is that here the company made an agreement with the intestate, and the failure to comply with that agreement by the negligence of the defendant company through its agent was the cause, as the plaintiff alleges, of his failure to receive the policy, and the loss accruing therefrom is a liability incurred by the negligence of the defendant.

When the condition upon which the contract of insurance was to take effect never occurred, of course no insurance is effected; but when the negligence of the company to comply with the conditions specified in its contract for the delivery of the policy was the cause of the failure to deliver the same, the defendant company was liable for the loss sustained by the negligence of the agent of the defendant company. The defendant by such negligence breached the legal duty which it owed to the plaintiff's intestate, and for the damage sustained thereby an action in tort may be maintained.

The testimony is that the defendant adopted the custom in carrying on its business of accepting applications, and issuing applications therein for delivery by its agent, stipulating in the application that the premium should be paid on delivery of the policy, and that the policy would be in force and premiums collected therein as and from the date thereof. The defendant, therefore, cannot escape liability when there is uncontradicted evidence that but for the unreasonable delay of its agent in making delivery of the policy to plaintiff's intestate, the policy would have been delivered while the plaintiff's intestate was in good health.

The application for the policy was received at the home office in Chattanooga on 7 June, 1921, was duly approved and accepted by the defendant, who, on 15 June, sent the policy so dated to its local agent at Mars Hill, N. C., for delivery to the plaintiff's intestate.

It has been repeatedly held that an insurance company is chargeable with the negligence of its agent for failing for an unreasonable time to forward the application and medical report for acceptance or rejection. *Duffey v. Life Assn.*, 160 Iowa, 19; 46 L. R. A. (N. S.), 25. There is a full discussion and collection of the cases relating to unreasonable delay in acting upon applications for insurance in *Bradly v. Federal Life Ins. Co.*, 15 L. R. A., 1021, and in the notes thereto. In this case there was no negligence by any unreasonable delay in forwarding the application, nor in acting upon it, but the application was accepted and the policy was issued and signed on 15 June, and promptly forwarded to the defendant's delivering agent in an envelope stating on the back that the applicant was "now a policy holder in the Volunteer State Life Insurance Company," the defendant in this action.

This policy, in the ordinary course of mail, should have come to the hands of the defendant's delivering agent on the next day, 16 June. He lived not far from the insured, who met him a few days after the receipt of the policy, and the agent told him that he had the policy for delivery. The assured told him he was ready to pay the premium, and asked the agent to make delivery, which the agent promised to do. The assured remained in good health until 2 July—15 days thereafter, when he was stricken with typhoid fever, and the agent made no effort to deliver until 6 July, when he declined to deliver because at that time the assured had been taken ill. Had the policy, when placed in the mail on 15 June, been directed to the insured, this would have been a delivery in law. *Lynch v. Johnson*, 171 N. C., 611. The fact that it was sent addressed to the defendant's agent made the agent a trustee for the delivery to the insured, and it was negligence on the part of the agent not to deliver it in reasonable time, and this negligence was the negligence of the company.

If the defendant's agent wrongfully failed to deliver the policy within a reasonably short time after its receipt, during which time the plaintiff's intestate was in good health and ready, able, and willing to pay the premium on delivery, as stipulated, and plaintiff's intestate having thereafter become ill, the defendant could not withhold the delivery so as to release it from responsibility. *Trust Co. v. Ins. Co.*, 173 N. C., 563.

The defendant had a form of receipt attached to its application for advance payment of premium, and it was stipulated therein that the insurance was effective from the date of the approval of the application

from the defendant's medical director. The agent elected to waive the advance payment on the premium, and stated that the premium was to be paid on delivery of the policy. The defendant accepted the application and issued its policy with knowledge of the waiver and stipulation. That is, it agreed that the insurance was to be effective from the date of the approval of the application by its medical director, but that the premium need not be paid until the policy was delivered.

In *Paul v. Ins. Co.*, 183 N. C., 159, it was held: "The time limited by a contract of life insurance for the payment of premiums to avoid a forfeiture is for the benefit of the insurer (the company), which it may waive by its acts and conduct."

In *Elam v. Realty Co.*, 182 N. C., 602, this Court said: "This action is not one against the insurance company in which plaintiff is seeking to hold it liable for an obligation not contained in the written policy, but plaintiff sues the agent broker for negligent failure to perform a duty he had undertaken and assumed as agent, by which plaintiff has suffered the loss complained of, and in our opinion the authorities cited are not apposite to the question presented on the record. It is further insisted for defendant that no cause of action is disclosed because there is no consideration given for defendant's promise, but the better considered decisions on this subject are to the effect that while the agent or broker in question was not obligated to assume the duty of procuring the policy, when he did so the law imposed upon him the duty of performance in the exercise of ordinary care."

The liability of the agent for negligently failing to perform his duties is clear, and the defendant is also liable for the acts and omissions of its agent within the scope of his employment. The duty rests upon every man to so conduct his affairs whether by himself or his agent as not to injure another, and if he does not do so, and another is thereby injured, he shall answer for the damages. Inasmuch as he had made it possible for his employee to inflict the injury, it is but just that he should be held accountable. 21 R. C. L., pp. 844 to 846; *Williams v. Lumber Co.*, 176 N. C., 180.

The soliciting agent of the defendant is made its agent and not the agent of the applicant. C. S., 6457. There are numerous decisions to the above effect.

The above authorities exactly apply to the case before us, and with the additional force that in this instance during the 15 days from the receipt of the policy to the time (2 July) during which the insured was in good health, he met the defendant's agent, who told him he had the policy for delivery and would deliver the same, and the assured told him that he was ready and able to make the payment and asked for the delivery, and there is the additional fact in this case that the policy

stated on its face that it was in effect from its date, from which time forward payments of premiums were to be counted, and the defendant was aware of the agreement that the company waived payment of the advance premium until its agent should make delivery.

Whether a policy is for life insurance or for fire insurance, the party making the application is entitled to have the security he asks for, and when his application has been accepted, as here, upon an agreement that the policy shall be valid from such acceptance, the insured should not be deprived of the benefit of the policy by the negligence of the company's agent in making delivery.

In *Duffey v. Life Ins. Co.* (Iowa), 46 L. R. A. (N. S.), 25, it is held: "An insurance company is chargeable with the negligence of its agent in failing for an unreasonable time to forward application and medical report for acceptance."

It is held that the insurance company is liable for negligent delay in passing upon or issuing a policy until a loss. *Boyer v. Ins. Co.*, 40 L. R. A. (N. S.), 164; and for unreasonable delay in passing upon an application. *Ins. Co. v. Neafus*, 36 L. R. A. (N. S.), 1211.

This case is much stronger, for here the application was accepted, the policy was issued, and was sent to the defendant's agent for delivery. He gave notice of its possession to the assured, who asked for its delivery and offered to pay the premium, and the failure to deliver was caused by the unreasonable delay of the agent, who should have delivered it, or, at least, the jury should have been permitted to find as a fact upon the evidence whether the delay was unreasonable or not.

In the very recent case of *Ins. Co. v. Phillips*, 113 S. E., 815, in which the opinion was filed 26 September, 1922, the Court of Appeals of Georgia held: "The deposit by the insurer in the mails of a policy of life insurance, addressed to the local agent of the insurer for delivery to the insured, upon which the premium has been paid and accepted by the insurer, amounts to its acceptance of the application and the delivery of the policy to the insured, and is a binding contract of insurance, and this is not defeated by the death of the insured before delivery of the policy, when at the time of the deposit of the policy in the mails he was alive and in good health, although he died before it was actually received by the local agent for delivery," citing 14 R. C. L., 899; 25 Cyc., 718; 16 A. & E. (2 ed.), 855; Joyce on Insurance (2 ed.), sec. 90; *Kilborne v. Ins. Co.*, 99 Minn., 176; *Francis v. Ins. Co.*, 55 Oregon, 280. To same purport, *Hoke, J.*, in *Waters v. Annuity Co.*, 144 N. C., 663.

The judgment of nonsuit should be set aside, and it must be submitted to the jury to pass upon the question whether upon the evidence there was unreasonable delay on the part of the defendant's agent in the delivery of this policy to the assured.

Reversed.

WALKER, J., concurring: I concur in the opinion of the Court, as written by the *Chief Justice,* and also in that of *Justice Adams,* not discerning any substantial difference between them.

Under ordinary circumstances the premium must first be paid and the policy delivered before the latter can take effect, that may readily be conceded. But the question here is quite different. The company promised to deliver the policy promptly, so that it would take effect and be available to the beneficiary when the applicant should die, and it made full preparation to do so, giving its agent orders to deliver it, which he failed to obey, as it was not personally convenient to do so because he thought he might save some time and effort if he should wait for an accumulation of policies to be delivered. It was entirely owing to this default of its agent, whose bounden duty it was to deliver the policy, that it was not delivered and the premium paid when the applicant was in perfectly good health. It was the duty of the company to deliver the policy, and it was notified that the applicant was fully ready, willing, and able to pay the premium and receive the policy, and this duty it failed to perform, whereby damage has resulted to the beneficiary, and a cause and right of action has accrued to the plaintiff by reason of this neglect and default of the company through its agent. The company had the right to employ an agent to assist it in performing its duty, but it is responsible for his neglect, or default, and must answer over for it to those entitled to receive the money on the policy if it had been properly delivered and was in force at the time of the applicants' death.

Respondeat superior is the maxim which fixes this liability. It is a plain case of a default by the agent, rendering the principal answerable for the wrong.

ADAMS, J., concurring: On 1 June, 1921, William Adie English applied in writing to the defendant for a policy of insurance on his life in the sum of $3,000, payable to his estate, and agreed to pay therefor an annual premium of $84.33. His application contained these provisions: "I hereby agree that this application (parts 1 and 2) and the policy when issued, including a copy of this application annexed thereto, or endorsed thereon, shall constitute the entire contract between the parties hereto." And further: "That the policy hereto applied for shall not take effect unless and until it shall have been issued and delivered to me and the premiums thereon paid to the company or its authorized agent during my lifetime and in good health."

The application was received by the defendant at its home office in Chattanooga on 7 June, 1921, and was thereafter accepted; and on 15 June the policy of insurance was sent by the defendant to its general agent at Burnsville and by him to its local agent at Mars Hill. To

deliver the policy and to collect the premium was a part of the local agent's duties. The applicant "began to get sick" on 1 or 2 July, and died 14 July, 1921. The plaintiff testified: "Mr. Buckner (the local agent who had the policy for delivery) come to my house on 6 July, 1921, and fetched the policy over there, which I think to be this same one, and told me it was for William Adie English; and he says, 'I come to see you—some one has told me he is sick, and I have come to see you to know what we would do about this policy.' 'Well,' I says, 'Let's go up and see Adie; I don't think he is very sick.' He said, 'You go up and see Adie and get the money and I will go to Asheville and see what they say up there about it.'"

"Q. Did he say what he would do when he got to Asheville? A. He says, 'I will bring you back the policy this evening; I won't wait until morning. I will bring it back this evening.' Then he says, 'I ought to have delivered this policy some time ago. I have had this policy on hand something like two weeks or over.' And he says, 'I met William Adie English out on the John White Hill, hauling lumber, and he seemed to be in good health then, and I had a conversation with him about wanting to raise this policy from $3,000 to $5,000.' And he says, 'English says, "Yes, I told Dr. Baird to have you change my application from $3,000 to $5,000,"' and he says, 'I can't do it now, because your policy is done allowed and I have got your policy, and I can't do it now, but we will make another application on this same examination and I will get you the other two thousand dollars on it.' And William Adie English says, 'All right, let the one you have come ahead. Bring it on, I have got the money for you when you bring it.'"

He stated that the policy came two weeks before 6 July. He said he held up this policy on the ground that Mr. Hyder was getting up some in the same territory, and he wanted to make the visit with Mr. Hyder, and he was looking for others that he had got in, too, and he wanted to make the same delivery with Mr. Hyder."

There was additional evidence tending to show that the applicant was ready, able, and willing to pay the premium. By the terms of the application the premium was to be paid when the policy was delivered.

The plaintiff concedes that the contract of insurance was not to become effective until the policy was delivered and the premium collected, but he asserts that his cause of action does not arise from the breach of an executed contract of insurance, but from the defendant's wrongful failure to deliver the policy after the application had been accepted and the policy had been duly signed, issued, and forwarded for delivery, and after the applicant while in good health had demanded its delivery. It is said that this is the very thing against which the defendant contracted. I think not. The parties contracted that the insurance should be in

force when the policy was delivered and the premium paid; but surely this cannot be construed into an agreement that the defendant should be released from liability for negligently failing to do that which for value it had agreed to do. In my opinion the whole controversy should be determined by the contractual relation that existed between the parties after the policy had been received by the local agent and after the applicant had requested the agent to deliver it and had signified his readiness to pay the premium. What is the undisputed evidence as to this relation? (1) The intestate's application had been accepted and the policy had been placed in the hands of the defendant's local agent; (2) it was the local agent's duty to tender the policy and call for the premium; (3) the premium was to be paid when the policy was delivered; (4) while the policy was thus in the possession of the local agent, and while the applicant was in good health, he requested the agent to deliver the policy and was ready to pay the premium; (5) the local agent admitted, on 6 July, that he had held the policy for two weeks and "ought to have delivered it some time ago." In my judgment the result was this: The application was the intestate's promise to pay the premium when the policy was issued and tendered to the applicant, for the premium was to be paid "cash on delivery." The acceptance of the application and the sending of the policy to the local agent was an agreement by the defendant that the policy should be tendered in a reasonable time if the applicant was in good health. When the agent received the policy, and for two weeks afterwards, the applicant was in good health; he demanded the policy; he was ready to pay the premium; the defendant's agent negligently failed to deliver the policy at a time when he should have delivered it. This the agent admits. So the situation was this: In effect the applicant said to the defendant, "I will pay you an annual premium of $84.33 if you will insure my life while I am in good health." The defendant answered, "We accept your offer." The evidence, then, presents the case of an offer and acceptance, or a promise for a promise, which is a sufficient consideration to support an agreement. Anson defines consideration to be something done, forborne, or suffered, or promised to be done, forborne, or suffered by the promisee in respect of the promise. Under these circumstances neither party had a legal right to withdraw from the agreement, and either would be liable in damages for disregarding it and committing a breach. True, an offer unsupported by any consideration may be withdrawn at any time before acceptance, but when an offer is accepted on the terms in which it is made before a valid revocation, the agreement becomes instantly binding on the parties, and neither party can subsequently recede from the agreement without the consent of the other. It should be borne in mind just here that the local agent's duty was purely ministerial. The defendant

had signified its acceptance of the applicant's offer by issuing the policy, and had thereby bound itself to execute its part of the agreement. Also, it should be remembered that the intestate insisted upon the defendant's performance. If the defendant, when the demand was made, had positively refused to deliver the policy at any time, it would evidently have been liable to the intestate—the evidence showing that he was then in good health and ready and able to pay the premium; and none the less is the defendant liable if its agent unreasonably delayed to comply with the demand and abide by its agreement. The result is the same whether the action be considered as a suit to hold the defendant liable for damages caused by its agent's negligence or a suit to hold it to the liability it would have incurred if the agent had not been negligent.

It is insisted that the agent would have delivered the policy but for the applicant's sickness and death, and that there was no obligation resting upon him to deliver it at any particular time. The contract, it is true, specified no definite time within which the policy should be delivered, but the law imposed upon the defendant the duty to see that it was delivered in a reasonable time after the intestate demanded it. The local agent was not the agent of the applicant, but of the defendant by whom he was employed for the purpose of delivering policies and collecting premiums. The crucial point in the case is whether the intestate was wrongfully denied possession of the policy, and thereby deprived of insurance to which he was justly and legally entitled. If the agent had the right to postpone the delivery for two weeks, why not for two months, or for twelve, and in this way to abrogate the agreement? He admitted substantially that his carelessness defeated the insurance.

After considering the questions involved in the light of principles which in my judgment are sustained by the authorities, I am convinced that a new trial should be granted, and the jury permitted to find from the evidence whether the intestate, while in good health, requested the agent to deliver the policy, and whether he was ready, able, and willing at that time to pay the premium; and, if so, whether the agent, carelessly disregarding the applicant's rights, failed to deliver the policy within a reasonable time thereafter.

The defendant introduced no evidence. The motion to dismiss the action as in case of nonsuit was allowed. I have treated the questions presented as if the circumstances which the evidence tends to establish were formally admitted. Upon consideration of all the evidence which may be offered at the trial the jury may find the facts to be otherwise, but with these matters we are not concerned.

Stacy, J., dissenting: The parties have deliberately contracted against the very contingency which has happened here. In the written application, signed by the plaintiff's intestate, appear the following stipulations:

1. "I hereby agree that this application (parts 1 and 2), and the policy, when issued, including a copy of this application annexed thereto, or endorsed thereon, shall constitute the entire contract between the parties hereto."

2. "That the policy hereby applied for shall not take effect unless and until it shall have been issued and delivered to me and the premium thereon paid to the company, or its authorized agent, during my lifetime and good health."

It is conceded that under this second provision no contract of insurance was ever effected. Plaintiff's intestate was never under any binding obligation to accept the insurance. He was at liberty to revoke his application and to reject the policy at any time prior to its delivery, or tender thereof. In my judgment, the plaintiff is not entitled to recover. *Ray v. Ins. Co.,* 126 N. C., 166. See, also, *Roe v. Ins. Asso.,* 17 L. R. A. (N. S.), 1144, and note; *National Union Fire Ins. Co. v. School District,* 122 Ark., 179; L. R. A., 1916 D, 238; *Meyer v. Central States Life Ins. Co.,* 103 Neb., 640; *Bradley, Admr., v. Fed. Life Ins. Co.,* 295 Ill., 381; 15 A. L. R., 1021.

The plaintiff's intestate elected to enter into this very kind of an agreement, and there is a well known distinction between obligations imposed by law and those created by express contract. Where the rights of the parties are fixed by agreement, the law will uphold such rights. *Clancy v. Overman,* 18 N. C., 402. Suppose it had been stipulated, in the present application, that the insurance applied for should not take effect until sixty days thereafter, and then only upon condition of the applicant's continued good health. Clearly the insurance company would have incurred no liability had the applicant died during the 60-day period. What is the difference between the supposed case and the case at bar? It was agreed that the policy should not take effect unless and until it was issued and delivered and the premium paid thereon during the lifetime and good health of the applicant. The condition upon which the contract of insurance was to take effect never occurred; hence, no insurance was ever effected. This much is conceded, but it is said that the policy could have been delivered before the applicant's sickness and death, and that it was the duty of the agent to do so. The defendant replies to this by saying that the agent would have delivered the policy but for the applicant's sickness and death, and that there was no obligation resting upon him to deliver it at any particular time. Both the applicant and the agent, with knowledge of the provisions of the contract, were simply waiting a convenient time for its delivery, when the applicant's sickness and death prevented the consummation of the contract. The defendant has breached no legal duty which it owed

to the plaintiff, and for which an action in tort may be maintained. See note, 9 Ann. Cas., p. 225.

I have examined every authority cited in the opinion of the Court, and many more, but I am unable to find any decision to sustain a recovery upon facts similar to those now before us. It will be observed that in those cases recognizing a right of recovery in an action of tort for negligent delay in passing upon the application, or failing for an unreasonable length of time to forward application with medical report for acceptance or rejection, an advance premium was paid by the applicant, or notes given therefor, and the insurance company was therefore under a legal obligation to act promptly and without any unreasonable delay. The applicant, after paying the first premium, had a right to rely upon the assurance that his application would be accepted or that he would be promptly notified in case of its rejection. But this is not our case. Plaintiff's intestate knew that the insurance was not to become effective until the policy was delivered and the premium paid by him. The very last case cited in the opinion of the Court, *Waters v. Annuity Co.*, 144 N. C., 663, calls attention to this distinction: "Accordingly, a binding acceptance can be, and frequently is, indicated by the mailing of a letter in due course containing an unconditional acceptance, or by sending a policy to an agent with instructions for unconditional delivery, *where there is no contravening stipulation in the contract itself.*" (Italics added.) Here there was a contravening stipulation in the contract.

And, speaking to the importance of this provision, in *Ray v. Ins. Co.*, 126 N. C., 169, *Faircloth, C. J.*, used the following language: "So we have an agreement with an important provision or condition attached, fixing an event on the happening of which the contract shall become operative. Of course, the minds of the contracting parties met as effectually on this provision as on any other part. This proposition was made by the applicant and accepted by the defendant. How is the applicant to escape the force of this provision? The proviso is not unreasonable. There is nothing in it illegal, nor does it contravene any feature of public policy. The proviso or condition is important to both parties. The applicant wants certainty and desires a certain day, when the agreement becomes absolute, and is stripped of all doubt. The defendant wants protection against unforeseen trouble that may arise after approval of the application and before delivery of the policy. A change of habits and impairment of health may intervene, and misrepresentations in the application may be discovered. These possibilities are understood by the parties, and they would make the subject unfit for insurance. Against these, the proviso affords protection; and to remove all doubt, it is provided that, until the policy is delivered, there is no

insurance in force." To like effect is the decision in *Ross v. Ins. Co.*, 124 N. C., 395.

One further observation and I am done. The following is taken from the opinion of the Court: "The defendant had a form of receipt attached to its application for advance payment of premium, and it was stipulated therein that the insurance was effective from the date of the approval of the application from the defendant's medical director. The agent elected to waive the advance payment on the premium, and stated that the premium was to be paid on delivery of the policy. The defendant accepted the application and issued its policy with knowledge of the waiver and stipulation. That is, it agreed that the insurance was to be effective from the date of the approval of the application by its medical director, but that the premium need not be paid until the policy was delivered."

If this be the law, why isn't the plaintiff entitled to recover on the policy? The Court is here talking about a blank form of receipt that was never filled out. The applicant had the option and the election to make an advance payment of premium with the application so that the insurance would be effective from the date of approval of the application by the defendant's medical director, but this was not done in the instant case. Plaintiff's intestate elected not to make any advance payment of premium and elected not to apply for a policy effective from the date of approval of the application by the defendant's medical director, but he elected to make application for insurance with the provision that the premium was not to be paid until the policy was delivered and the premium paid by him during his lifetime and in good health. There certainly was no waiver of any payment of any premium by the agent of the company or by the company itself. The plaintiff's intestate elected not to make any advance payment as he had the option and the right to do, but he voluntarily chose and elected the other kind of insurance on which the premium was payable on delivery of the policy, and on which date the policy was to become effective.

I think the judgment of nonsuit should be upheld. The policy was never delivered; no premium was ever paid; it would be unjust and inequitable, under the facts and circumstances of this case, to permit a recovery against the insurance company.

J. W. LATHAM v. PASQUOTANK HIGHWAY COMMISSION, T. L. HIGGS, AND STATE HIGHWAY COMMISSION.

(Filed 28 February, 1923.)

1. Pleadings—Demurrer—Speaking Demurrer.

A demurrer to a complaint admits the matters therein alleged to be true, and denies that they are sufficient, thus accepted, to constitute a cause of action; and where a demurrer is dependent upon allegations therein, or attempts to sustain itself, it is bad as a "speaking demurrer."

2. Same—Defenses—Government Agencies—State Highway Commission.

A complaint which alleges that the defendant unlawfully entered upon its land, changed the flow of water, or caused it to stand thereon and to sob, soak, and sour the same, rendering it valueless for the purpose of cultivation and producing a crop, or for the uses for which it is adapted, is, in effect, an allegation of an unlawful trespass and the wrongful taking and detention of a part thereof; and where the defendants are a county highway and the State Highway Commission, and desire to avoid liability for the acts committed by them because done in behalf of the State, as its agents and employees, in constructing or maintaining a public highway, under the law, it should not be done by demurrer, but by way of answer, stating the facts.

3. Same—Pleading Over—Courts.

The demurrer of the highway commission to a complaint being bad as not sufficiently setting up their exclusion from liability on the ground of their employment as an agency for the State government in the construction and maintenance of the State's highways, and it also appearing that one in his individual capacity has been made a party defendant, the demurrer is overruled with permission given to the defendant to plead over, and set up their different defenses, as they may be advised.

APPEAL by plaintiff from *Connor, J.*, at January Term, 1923, of PASQUOTANK.

George J. Spence for plaintiff.

Attorney-General Manning and Walter L. Cohoon for defendant State Highway Commission.

W. L. Small and J. C. B. Ehringhaus for Pasquotank Highway Commission and Higgs, defendants.

WALKER, J. This is in form and substance an action of trespass for unlawfully and wrongfully entering upon the plaintiff's land and injuring and damaging the same, and of unlawfully and wrongfully appropriating a part of the land to their own use. That while thus in the unlawful possession of the said land defendants wrongfully and tortiously committed certain depredations thereon, which were greatly injurious to it. That they changed the natural flow of the water on the land in

the ditches and caused water to accumulate and be dammed or retained thereon, and forced water from other lands in upon the plaintiff's tract of land, and caused the water thus unlawfully cast upon this land to sob, soak, and sour the same, and have further caused the water unlawfully thrown upon plaintiff's land to overflow the same so that the crops on it were destroyed and the land rendered valueless for the purpose of cultivating and producing crops upon it, or for being put to the uses for which it was adapted. We have expressed it in language somewhat different from that employed in the complaint, but with perfect accuracy, there being not the least deviation from the substance and legal effect of it all.

It is apparent that plaintiff has, and intended to allege, barely an unlawful trespass upon his land, and a wrongful taking and detention of a part thereof, and this being so, the questions raised and discussed in the case before us, and in the briefs, are not presented. If the defendants desired to raise solely those questions, as to their liability to be sued for acts committed by them in behalf of the State, as its agents or employees, in constructing or maintaining public highways, under the law, such questions as were raised and decided in *Moody v. State Prison,* 128 N. C., 12, and *Carpenter v. R. R.,* 184 N. C., 400, they should have filed an answer and set up the facts necessary to show more clearly and more in detail than they do in their demurrer, by what authority they were acting when they are alleged to have committed so serious a trespass upon and invasion of the plaintiff's land. It is not the office or function of a demurrer to allege facts, and upon that allegation to challenge the adversary's legal right, or the validity of his claim, which is called a "speaking demurrer," but its sole purpose is to take the facts as they are stated in the opposite pleading, or to admit the truth of its allegations, and then to question their sufficiency in law to authorize the granting of the relief demanded, if directed against a complaint, or the soundness of the defense if against an answer. But the statements in the complaint under construction here are not broad enough to include the defense which we suppose is intended to be raised, and it is not to be presumed that plaintiff would have made it so. Nor does the demurrer supply the necessary facts, nor should have been expected to do so, when confined to its proper office and scope.

We do not, therefore, pass upon the important questions discussed before us, or comment upon the cases and authorities cited by the respective parties, such as *Mason v. Durham,* 175 N. C., 638, and *Carpenter v. R. R.,* 184 N. C., 400, and *Moody v. State Prison,* 128 N. C., 12.

When the questions they discuss are fairly presented in the pleadings and record we will be called upon to consider them, but we cannot do so before they are before us for decision.

The demurrer will be overruled, but the defendant will be permitted to answer over.

We have not overlooked the fact that one of defendants, Mr. Higgs, is an individual, and if he wishes to protect himself from the consequences of the trespass, as it appears to be from the pleading as now drawn, he must specially plead and prove the facts exonerating him. Demurrer overruled.

Reversed.

CAROLINA BAGGING COMPANY, A CORPORATION, v. J. M. BYRD, INDIVIDUALLY, AND AS SURVIVING PARTNER OF J. M. BYRD & COMPANY.

(Filed 28 February, 1923.)

1. Evidence—Nonsuit—Trials—Burden of Proof.

Where there is conflicting evidence upon the material facts at issue in an action, so that men of fair minds may reach a different conclusion thereon, the issues should be submitted to the determination of the jury under proper instructions from the court; and defendant's motion for nonsuit especially should be denied when the burden is upon him to prove the matters set up by him in defense.

2. Same—Banks and Banking—Bill of Lading Attached to Draft—Pleas—Payment.

A local bank received for collection a draft with bill of lading attached against a partnership of which its president was a member, and the president detached the bill of lading from the draft, gave it to his drawee partner, who obtained the goods from the railroad and converted their proceeds to his own use or that of the firm. A few days thereafter the bank failed, and its president committed suicide. In the drawer's action against the drawee, surviving partner, the evidence was conflicting as to whether the drawee firm had instructed the bank to pay the draft out of the firm's deposit, etc., relied upon as a defense, the burden of proof of which was on the defendant: *Held*, defendant's motion as of nonsuit was improvidently granted and a new trial is ordered on appeal.

APPEAL by plaintiff from *Horton, J.*, at October Term, 1922, of VANCE.

Judgment of nonsuit, and plaintiff appealed.

Hicks & Son for plaintiff.

Young, Best & Young and L. L. Levinson for defendant.

WALKER, J. Plaintiff sold to J. M. Byrd & Company, of Coats, Harnett County, a carload of cotton bagging for $1,125 cash, and had it shipped to them on 21 October, 1920, drawing a draft attached to the bill of lading, which it deposited in the Citizens Bank and Trust Com-

pany of Henderson for collection. Said bank sent the draft and bill of lading to the Bank of Coats, N. C., of which N. T. Patterson, of defendant firm, was president, for collection of the draft and the delivery to defendant firm of the bill of lading.

N. T. Patterson, president of the Bank of Coats, and a member of defendant firm, received the said draft and bill of lading, and he separated the two papers, handed the bill of lading to his partner, J. M. Byrd, who took it to the railway company, to which he delivered it, and from which he received the said cotton bagging, and converted the same to his own use, or to the use of J. M. Byrd & Company. A few days thereafter the Bank of Coats closed its doors, and said N. T. Patterson killed himself, and the plaintiff has received nothing.

J. M. Byrd pleaded, when sued individually and as surviving partner by plaintiff, that he is not liable because the bank was to blame for giving him the bill of lading by the hand of its president, his partner, and in not taking his firm's money, either out of his hand or out of the bank, and sending it to the plaintiff. Judge Horton so held, and nonsuited the plaintiff, and this ruling is the subject of the principal exception.

The plaintiff contends that J. M. Byrd and N. T. Patterson, being partners at the time of this transaction, doing business under the firm name and style of J. M. Byrd & Company, each partner and the firm were jointly and severally liable for the wrongful acts or omissions of the firm, or of any member thereof, when the wrong was done in the ordinary course of its business, and for this plaintiff's counsel invites our attention to the following authorities:

By the great weight of authority, a partnership is bound and is liable for the frauds committed and fraudulent representation of one partner made in the course of the partnership business, though the other partners are innocent of any participation in the fraud. The reason for this rule is found in the general principle of the liability of firms for unlawful acts committed by their agents, within the general scope of their agency. A right to sue the partnership for damages is the usual consequence of the fraud or deceit of one partner acting within the scope of his general partnership authority, and this rule imposing civil liability on an innocent partner, for the fraud of his copartner, is especially applicable where the former receives the fruit or benefit of the fraudulent conduct. 20 R. C. L., sec. 128. Section 146, on page 114, expresses the same principle as applicable, making partners civilly liable for each other's torts, committed in connection with the partnership business, and within the scope of his agency.

The firm is liable for the wrongful acts or omissions of a partner while he is acting in the ordinary course of the firm's business, or with

his copartner's authority. For other separate or individual torts committed by him, neither the firm nor his copartners are liable, unless their assent or ratification is shown. . . . All partners are liable for the conversion by a copartner of the property of a third person, if done in the ordinary course of the firm's business, or within the scope of his authority as such. 30 Cyc., 523-525.

The tort of one partner is considered the joint and several tort of all the other partners; and the partner doing the act is considered the agent of the other partners, when the wrongful act is connected with the business of the firm and is incident to it as the business is carried on; and any one of the partners is chargeable *civiliter* to the same extent to which his partner would be bound. *Heirn v. McOughan*, 32 Miss., 17; 16 Amer. Dec., 588.

A firm is liable for a penalty, although but one party was guilty of the misconduct, upon the theory that all its members are, by the terms of the contract of partnership, constituted agents for each other, and that when a loss must fall upon one of two innocent persons, he must bear it who has been the occasion of the loss, or has enabled a third person to cause it. *Stockwell v. U. S.*, 13 Wallace, 531. See, also, *McIntyre v. Kavanaugh*, 242 U. S., 138; *Hall v. Younts*, 87 N. C., 290.

It is also contended by plaintiff's counsel that the doctrine is not new to us, but has prevailed in this Court time out of mind, it having been long since conceded to be an elementary or horn-book principle, it having dated back to the earliest records of the law, not only to Coke and Blackstone, but the Year Books and Glanville, Bracton and Fleta. It is asserted to have been recognized and clearly stated and enforced in *Hall v. Younts*, 87 N. C., 290, where *Justice Ruffin* substantially said: For, though accustomed to see the point raised as to how far a firm may be answerable for wrongs committed by its individual members, we have never before heard a doubt expressed as to the responsibility of each and every member, for the tortious acts of the firm, and we cannot conceive it to be well founded. As a general rule, partners, though bound by the contracts, are not bound by the torts of each other; that is to say, torts committed with regard to matters disconnected with the partnership business. Nor are they ever held to be criminally responsible for the acts of each other, even though done in the course of trade, but only those who are actually guilty. But partners, like individuals, are responsible for torts committed by their agents under express commands, under the maxim *qui facit per alium per se*, and a partner, acting in the name of the firm touching its business, and with a knowledge of the other members, must be regarded as the agent of all. In such cases, says Collyer on Partnership, sec. 457, the tort is looked upon as the joint and several tort of all the partners, and they may be pro-

ceeded against in a body, or one may be sued for the whole of the injury done. And this doctrine of the text-writer is fully supported by the decisions of the courts. *Gray v. Cropper,* 1 Allen, 337; *Linton v. Hurley,* 14 Gray, 191; *Locke v. Steains,* 1 Met., 560. And in *Doremus v. McCormick,* 7 Gill, 49, and *Boyce v. Watson,* 3 J. J. Marshall (Ky.), 498, the very point was made, as here, in regard to such declarations, and it was held that the declarations of a partner, upon whom the capias had not been served, were properly admitted as evidence against his copartners. The declarations of one partner are admissible against his copartner, not upon the ground of their being parties to the same action, but because of their unity as partners. Plaintiff further refers to *Smoak v. Sockwell,* 152 N. C., 505, where it is said: "It is well established that in case of joint torts the plaintiff may sue either all or some of the wrongdoers, at his election." (This was a case of the tort of a member of a partnership.)

Plaintiff made other serious charges against the defendants, or rather against J. M. Byrd and L. T. Patterson, alleging that they acted together in this transaction to obtain possession of the bill of lading, so that they might get the cotton bagging without paying the sight draft attached to the bill, which it was their clear duty to do, both legally and morally, the more so because of the peculiar and confidential relations of the parties. They thus express this charge: "The bagging was bought from plaintiff by Byrd & Company. Patterson, the other member of the firm, had no right in law or morals to assume a position as collector of the draft for a bank when such position conflicted with his engagement as a partner of defendant company to pay the plaintiff the draft and take the goods. His receiving, converting, and delivering the bill of lading to Byrd was an act of bad faith. He did it as a member of the firm of Byrd & Company, as well as president of the bank." No servant can serve two masters, etc. Matthew, 6:24; Luke, 6:13. This is a part of the law of this State. *Sumner v. R. R.,* 78 N. C., 292; *Froneberger v. Lewis,* 79 N. C., 429. The reason why double agencies are not approved in law is because they cause "double dealing." Reduced to its lowest terms, defendant's position is: "I bought for cash in advance, and because I got it by a trick of my partner without paying for it in advance, you can't make me pay for it at all."

As illustrative of the fraudulent character of what is termed "a conspiracy" of defendants to cheat and defraud the plaintiff, the latter, in their brief, suggest the following dates as bearing upon the question:

"Date of draft and shipment of goods from Henderson—21 October, 1920.

"Date shipment left Durham for Coats—26 October, 1920.

"Date of delivery to Byrd & Company by the railroad and taking up of the bill of lading—27 November, 1920.

"Date the bank closed its doors—4 December, 1920.

"Date of Patterson's suicide—5 December, 1920."

The plaintiff, therefore, finally contends that defendant is liable for the price or value of the cotton bagging, or for damages for its conversion, or for the fraud in so manipulating the papers that they got possession of it without paying the sight draft, and that the Bank of Coats is also liable for negligence, even if it did not participate in the fraud of the other two parties to the transaction.

The defendant's counsel, on the contrary, defend by alleging and by proving, as they assert, that the sight draft was paid in law, if not in fact, as appears by the undisputed proof, and they reached that conclusion by the following reasoning, which is stated synoptically. There seems, they say, to be no case in our Reports exactly in point with the case at bar, but they cite *Cotton Oil Co. v. Sellars,* 89 S. E., 454, in which they say that the facts are on all fours with this case, and in which it was held that the delivery of a bill of lading to a customer who had sufficient funds on deposit to pay the amount of a draft attached, coupled with an instruction to the bank to pay said draft out of those funds, which the bank agreed to do, amounted to a payment by the customer of said draft, although the bank closed its doors the following day and failed to make remittance of said funds. It is also said in Michie on Banks and Banking, at p. 1414: "Where a bank sent a note to a correspondent for collection, and the latter, which had the maker's money on deposit, with instruction to pay it on the note, charged the amount to the maker, and credited it to the sender of the note in regular course of business, it constitutes a payment, though the bank failed the next day, and returned the note without endorsing anything thereon, or accounting for the collection." And they further contend that, conceding for the purpose of this case what the record clearly discloses, not only that the collecting bank, as agent of the creditor or drawer, impliedly consented to apply the funds in its hands belonging to the debtor, so far as it might be necessary, to the payment of the draft, in compliance with the usual custom between its depositor, the drawer, and the bank, as to such drafts, and nothing whatever appears in evidence to negative the conclusion that the agent of the creditor so consented to apply the money of the debtor as directed, but the fact that the collecting bank surrendered to the debtor the bill of lading attached to the draft, after receiving instructions from him to charge the amount of the draft against his account, amounted in effect to an express agreement by the bank to apply the money in its hands as directed by the debtor, and was an affirmative act on the part of the bank showing its acceptance of that money as

agent of the creditor, and for this proposition counsel rely on 22 A. & E., p. 578, which they think supports their contention, and they deem ample authority for the position that where the agent of the creditor to receive payment is also agent of the debtor, and as such receives money belonging to the latter which he has been directed by the latter to apply in payment of the creditor's claim, the payment is not to be considered complete, so as to discharge the liability of the debtor to the creditor, until the common agent has expressly assented to so apply the money received by him, or has done some act showing acceptance of such money as agent of the creditor. The effect of such debit and credit of accounts has chiefly arisen where the common agent was a bank, and this principle counsel further contend directly and strongly apply to the very facts of this case.

As the case must be returned to the lower court for another trial, we prefer not at this time to express any opinion as to the merits of the respective contentions, but to leave that court open-minded, so that it will not be embarrassed by any apparent leaning on our part to the one side or the other.

But we will say, in order to dispose of this appeal, that the court erred in granting a nonsuit upon the evidence, which was not all one way, and did not tend to only a single conclusion. There was sufficient controversy and doubt as to the essential facts to require the intervention of a jury for the purpose of finding what they are and applying the law thereto under the guidance of the presiding judge. As an example of the conflict in the evidence, the witness, W. P. Gholson, testified: "Mr. Byrd told me he had funds on deposit in the bank with which to pay the draft, and that he ordered the bank to pay it," while in another place in the record he is reported to have testified that Mr. Byrd did not tell him that he had authorized and directed the bank to pay the draft, and that he did not see the cashier of the bank on his visit to the town of Coats; and further, that Mr. Byrd told him that he got the bill of lading from the bank; and, also, that Mr. N. T. Patterson had charge of the checking account, and that he (Byrd) did not know anything about the payment. There are some other discrepancies, and some apparent contradictions, in the evidence, but we need not devote attention to them at the present time, as they may be cleared up at the next hearing, and a perfectly consistent account of the entire matter be given. There were some questions of evidence, but they are not of importance now, as the entire complexion of the case may be changed hereafter.

But in this case not only is there a conflict of evidence to be settled by a jury, as two different views of it are presented, and two intelligent men may reasonably differ as to it, but the plea here is payment, and the burden of proof is upon the defendant who pleads it, and a nonsuit

is not proper in such cases. *Kyles v. R. R.*, 147 N. C., 396; *Currie v. Gilchrist, ibid.*, 656. In the *Kyles case, supra*, the Court said: "In considering this question the courts will accept the evidence in the most favorable light to the plaintiff, and if there is any evidence, or if different minds can draw different conclusions, it is the duty of the trial judge to submit the case to the jury," citing *House v. R. R.*, 131 N. C., 103; *White v. R. R.*, 121 N. C., 484; *Wittkowsky v. Wasson*, 71 N. C., 454; *Moore v. R. R.*, 128 N. C., 455.

Upon a full consideration of the case and the able and learned arguments, our opinion is that there was error, and there must be another trial.

Reversed.

I. A. NOWELL AND J. H. ALLEN v. H. S. BASNIGHT, A. P. ROBERTSON, J. W. GODWIN, GENERAL WYNNS, AND W. E. FENNER.

(Filed 7 March, 1923.)

1. Actions—Damages—Value of Property—Burden of Proof—Evidence—Fraud.

In an action to recover the value of tobacco the plaintiffs alleged they had purchased from the landlord and the tenant renting upon shares, there was evidence tending to show that a part of this tobacco was secretly taken by the defendants from a place where the plaintiffs had stored it, and concealed on the premises of one of the defendants and sold by him on the warehouse floor, a place more inconvenient than the neighboring tobacco market, where ordinarily it would have been sold: *Held*, the burden was on the plaintiffs to prove themselves the purchasers, as they alleged, and it was competent for them to do so by their own direct testimony and that of the sellers, and also the value of the tobacco thus taken, and circumstances tending to show fraudulent transactions among the defendants finally concluding in the sale upon the warehouse floor in a secretive manner.

2. Evidence — Admissions — Appeal and Error — Evidence Confined by Court.

Where there are several defendants in an action to recover the value of goods the plaintiffs had purchased, with evidence that the defendants had secretly taken the goods from the plaintiffs' premises and had disposed of them, objection to the admissions of one of the defendants cannot be sustained, when it appears that the trial judge had properly restricted the evidence to the one admitting it.

3. Same—Duty of Appellant.

Where the admission of one of the parties on the trial is competent evidence as to the defendant making it, and not as to his codefendant, the latter should request the court to confine it to the one making the admission, when it also affects himself, but no harm was done in this case, as the judge of his own motion did so confine it.

4. Evidence—Conversations—Hearsay.

Testimony of a defendant as to a conversation he had had with a co-defendant is incompetent as hearsay when his codefendant is absent from the trial and has not testified.

5. Appeal and Error—Evidence—Record.

Exception to the exclusion of testimony upon the trial will not be considered on appeal when the appellant has failed to set out the excluded testimony in the record, so that the Supreme Court may pass upon its competency.

6. Evidence — Conspiracy — Common Design—Exclusion of Evidence—Appeal and Error.

Where the plaintiffs' action is to recover the value of certain tobacco owned by the plaintiffs, and there is evidence that the defendants acted with a common design or purpose in secretly taking it from the plaintiffs' premises, the relevant testimony of one of them previously taken on written examination before the clerk is competent in corroboration of the witness so examined, and as to all of the defendants, and the exclusion of it by the court as to the appellant could not have been to his prejudice.

7. Evidence—Demurrer—Statutes—Waiver.

In order for the defendants to avail themselves of the provisions of C. S., 567, in demurring to the plaintiffs' evidence on the trial, applicable in criminal cases under the provisions of C. S., 4643, it is necessary for the defendants also to demur after the plaintiffs have closed their case, or it will be construed as a waiver of their right to demur.

APPEAL by plaintiffs and defendants J. W. Godwin and General Wynns from *Horton, J.*, at August Term, 1922, of BERTIE.

Winston & Matthews for plaintiffs.

Pritchard & Craig, Roswell C. Bridger, and S. Brown Shepherd for defendants.

John Davenport for Basnight.

WALKER, J. The plaintiffs, L. A. Nowell and J. H. Allen, during the year 1918, were partners in trade, buying leaf tobacco of farmers in Bertie and Hertford counties. This action is brought to recover of defendants the value of certain tobacco raised on the Bass land, and the Phelps tobacco, belonging to plaintiffs, as they allege.

Q. A. Bass owned a farm in Bertie County, and leased his son, J. A. Bass, ten acres of the land to be planted in tobacco. Under their arrangement the elder Bass, as landlord, was to receive half of the crop when prepared for market, and the other half belonged to the son. The son was called to the war before he had completed the crop. Before going to camp he sold out to Asa P. Robertson, who simply took the place of young Bass as tenant of the father. After this arrangement was made, the elder Bass sold his interest in the crop to plaintiffs Nowell

and Allen, and received payment in full from them. Later Robertson sold his interest in the crop to plaintiffs Nowell and Allen, who then became the owners of the whole crop. The tobacco was housed and put in the pack house on the Joe Harrell farm in charge of one Evans. There was also placed in this pack house a lot of tobacco plaintiffs had bought of a man named Phelps. The value of these two lots of tobacco was placed as high as $3,000. The evidence is that some of the tobacco was carried from the Harrell pack house and put in a barn on a farm owned by defendant Godwin. Five loads of the rest was carried to Ahoskie and placed in the loft of Godwin's livery stable. This particular lot Godwin and Wynns sold to the defendant Basnight. Robertson has left the State and was never served with process. Wynns was present in court, but was not placed on the stand as a witness. He introduced his own examination taken before the clerk.

Neither of the plaintiffs authorized the removal of the tobacco by Wynns and Robertson, or knew for some time that they had removed it. They carried away five wagon loads to Godwin's stable in addition to that carried to the Godwin farm—the Britton place. When Godwin sold the tobacco to Basnight he had the check given for the price made payable to Wynns. In his examination before the clerk, Wynns said that he was never paid anything by Godwin, or any one else, for the tobacco.

No exception was taken to the charge, no special prayers were tendered and refused, no motion for nonsuit was made, at the close of plaintiffs' evidence, but such a motion was made at the close of all the evidence.

The plaintiffs having sued for the value of their tobacco, it was incumbent on them to show ownership.

The first seven exceptions are taken to the admission of evidence tending to show such ownership.

Exception one: Q. A. Bass, landlord, was permitted to say that he sold his interest to the plaintiff. How else could plaintiffs show they acquired ownership of the crop?

Exception two: Q. A. Bass, landlord, was permitted to say that plaintiffs paid him for the tobacco; the tobacco in question. Q. A. Bass, as landlord, owned half the Bass tobacco. Plaintiffs bought that half of the Bass crop of him. His testimony covered that point, and was competent. That is the only part of his testimony objected to. We cannot sustain the ground of these two objections.

Exceptions three and four cover the same idea. J. A. Bass, the tenant, was testifying. Plaintiffs claim to have purchased his half of the crop. J. A. Bass sold to A. P. Robertson. No one denied it. It was necessary to prove it. The evidence objected to is that after witness J. A. Bass sold to Robertson, he, Bass, saw Robertson working the crop.

The witness Bass said that Wynns was not connected with this arrangement between himself and Robertson. No one claims that he was. These objections are of the same character as the first and second. "Taken during the preliminary stages out of an abundance of precaution." Under all four exceptions the evidence was competent. It was not denied by any one.

Exception five: J. H. Allen, managing partner of the plaintiffs, was testifying as to how and when he bought the two halves of the Bass crop. The defendants objected to his statement that "a few days" intervened between the purchases. No ground of exception is set out in the case, and there can be none.

Exception six: J. H. Allen narrated the terms of his purchase from Robertson, who purchased of the tenant, J. A. Bass. It seems that the identical testimony had been given by this witness before and without objection. The evidence is competent to show the extent of plaintiff's purchase, and that no liability attached to the partnership for making, housing, and marketing the crop.

Exception seven: This relates to the claim for the value of the Phelps tobacco. The claim of plaintiffs is for two lots of tobacco taken from one packhouse; Bass's tobacco and Phelps's tobacco.

Without objection plaintiffs had, at length, testified that they had purchased the Phelps tobacco and put it in the same pack house where the Bass tobacco was. The defendants cross-examined in regard to this at some length.

It surely was competent to show by Phelps that he had in fact sold his crop to plaintiffs. The evidence was competent in chief, substantively, and certainly it corroborated Allen.

Exception eight: The court admitted evidence to show that Robertson and Godwin were farming together. This was competent as tending to show Godwin's interest in the crop. No harm could possibly come of it.

Exception nine: The evidence is that with large sales warehouses in Ahoskie, Godwin, who lives there, and in whose stable loft the tobacco was placed, sold the tobacco to Basnight, who shipped it to Rocky Mount, N. C., for sale. The defendant Basnight was on the stand. Certainly it was proper, as against him, to show that the transaction was fraudulent and not open and fair. The admission was good as against Basnight, who is not complaining. Godwin should have asked that the evidence be confined to Basnight. He did not do so and is bound by it.

At different times during the trial, evidence was restricted and confined to particular persons, or in corroboration. After the admission of the evidence, Basnight's attorney examined him at length on it and without objection from Godwin or from Wynns.

Exception ten: When Godwin sold the tobacco to Basnight he directed that the check be made payable to General Wynns. Wynns endorsed that check by making his mark. Godwin was claiming that he got none of the money, Wynns, under examination before the clerk, swore he got none. Godwin wrote the name "General Wynns" on the back of the check. It was relevant and important to show that fact. Curtis, cashier of the bank, knew Godwin's handwriting, and testified to it. The plaintiffs say that all this objection "goes up in smoke" when Godwin afterwards goes on the stand and admits that he did the endorsing by writing General Wynns' name on the back of the check.

Exception eleven: Godwin was on the stand as a witness for himself. He was asked to narrate a conversation had between him, Godwin, and Robertson at the time the tobacco was put up in the stable loft. The court excluded it. Robertson was not a witness. He was not served with process. For some cause he was out of the State. No deposition was taken. The evidence, therefore, was hearsay.

A fatal defect in the exception is that the defendant did not set out the excluded evidence so the court could see its competence, or incompetence. It was the duty of defendants to have done so. *Lynch v. Veneer Co.*, 169 N. C., 170, and cases there cited.

Exception twelve: Godwin alone takes this exception.

Joe Harrell, a witness for the plaintiff, was asked: "Did Wynns tell you he never got a cent for this tobacco?" To this Godwin excepted. The court admitted this evidence against Wynns, but not against Godwin. With this caution and restriction the court admitted the evidence, and in that light only. Wynns did not except. This caution was full and clear.

We here refer to the fact that the defendants put in evidence an examination of Wynns had before the clerk. It is significant, plaintiffs contend, that Wynns was at the trial, in court all the time and cross-examined witnesses, but did not take the stand as a witness. In his written examination, taken before the clerk and put in evidence by the defendants, Wynns says: "Nobody paid me for the tobacco. I did not get any of the money for the tobacco."

The admitted evidence was apparently competent in corroboration. There is ample evidence of a common design and purpose, and the court might have admitted the evidence against Godwin. It did not, and he has no ground of complaint.

We have thus taken up the exceptions as to evidence one by one, and considered them carefully, and even with scrutiny. We would not have done so had it not been for the very exhaustive and searching discussion of them by Mr. Shepherd, which was presented by him with his usual ability and learning and his legal acumen. But after a careful analysis

of the case, and deliberation upon the leading and controlling questions raised in argument before us, we find that a simple declaration by us of our conclusion that none of the exceptions as to evidence is tenable would perhaps have been all-sufficient. We feel now, though, that we have acted not only more deferentially, but more satisfactorily, by pursuing the course taken by us, and will proceed to the consideration of the other questions before us.

Exception thirteen: This is taken to the refusal to nonsuit at the end of all the evidence. No such motion was made at the close of plaintiffs' evidence, and no exception then noted. The motion cannot primarily come at the close of all the evidence. It must be made initially at the close of the plaintiffs' evidence, and, if the motion is refused, there may be an exception and appeal. But if evidence is offered by defendant, the exception is waived. At the end of all the evidence the exception may be renewed, but not then made for the first time.

C. S., 567, clearly and distinctly points out the practice and procedure in the case of a demurrer to evidence and motions to nonsuit upon the evidence, and it must be pursued, if not strictly, at least, substantially. The notes to the section show what had been the construction of the section by this Court. The defendants did not adopt the proper course, and their motion was properly overruled. But had the motion to nonsuit been properly submitted, it should have been overruled upon the merits, as there was ample evidence to support plaintiffs' case and its credibility was for the jury to pass upon. So whichever way is given, the ruling of the court was the correct one.

The following may be considered as fairly interpretative of C. S., 567:

"Change of practice. This section changes the practice in demurrers to the evidence: *Riley v. Stone,* 169 N. C., 421; *Prevatt v. Harrelson,* 132 N. C., 252; *Means v. R. R.,* 126 N. C., 424. Under the act of 1897, prior to act of 1899: *Parlier v. R. R.,* 129 N. C., 262; *Purnell v. R. R.,* 122 N. C., 832; *Worth v. Ferguson,* 122 N. C., 381; *Wood v. Bartholomew,* 122 N. C., 177. It does not apply to a defense, *Lester v. Harward,* 173 N. C., 83, but may apply to a counterclaim, *Tarault v. Seip,* 158 N. C., 363. Held not to apply to criminal action, *S. v. Hagan,* 131 N. C., 803; but may now, under section 4643.

"Time of making motion. It must be made first at the close of plaintiff's evidence, and before defendant introduces any evidence: *Smith v. Pritchard,* 173 N. C., 720; *McKellar v. McKay,* 156 N. C., 283; *Boddie v. Bond,* 154 N. C., 359. It is not allowed after verdict, *Vaughan v. Davenport,* 159 N. C., 369; nor after verdict set aside, *Riley v. Stone,* 169 N. C., 421; nor after judgment by default and inquiry, *Mason v. Stephens,* 168 N. C., 370.

"If the first motion is overruled, the defendant may except and go to the jury; or except, introduce evidence, and renew motion after all the evidence: *Parlier v. R. R.*, 129 N. C., 262; *Means v. R. R.*, 126 N. C., 424; *Worth v. Ferguson*, 122 N. C., 381; *Miller v. R. R.*, 128 N. C., 26; *Riley v. Stone*, 169 N. C., 421. Exception is waived if motion is not renewed: *Rackley v. Roberts*, 147 N. C., 201; *Bordeaux v. R. R.*, 150 N. C., 528; *Earnhardt v. Clement*, 137 N. C., 91; *Blalock v. Clark*, 137 N. C., 140; *Fritz v. R. R.*, 130 N. C., 279; *McCall v. R. R.*, 129 N. C., 298.

"Effect of motion. The motion admits the truth of plaintiff's evidence in light most favorable to him: *Rush v. McPherson*, 176 N. C., 562; *Wood v. Public Corporation*, 174 N. C., 697; *Johnson v. R. R.*, 163 N. C., 431; *Madry v. Moore*, 161 N. C., 295; *Poe v. Tel. Co.*, 160 N. C., 315; *Bell v. Power Co.*, 156 N. C., 316; *Mullinax v. R. R.*, 156 N. C., 541; *West v. Tanning Co.*, 154 N. C., 44; *Mercer v. R. R.*, 154 N. C., 399," and other cases in C. S., on page 567.

The motion should not be allowed when there is any evidence, more than a scintilla, upon which to base a verdict: *Rogerson v. Hontz*, 174 N. C., 27; *King v. R. R.*, 174 N. C., 39; *Moore v. R. R.*, 173 N. C., 311; *Lindsey v. R. R.*, 173 N. C., 390; *Meares v. Lumber Co.*, 172 N. C., 289; *Collins v. Casualty Co.*, 172 N. C., 543; *Barnes v. R. R.*, 168 N. C., 512; *McRainey v. R. R.*, 168 N. C., 570; *Pate v. Blades*, 163 N. C., 267, and other cases in C. S., on page 567.

When contributory negligence appears from the plaintiff's evidence, a nonsuit is properly granted: *Foard v. Power Co.*, 170 N. C., 48; *Dunnevant v. R. R.*, 167 N. C., 232; *Fulghum v. R. R.*, 158 N. C., 555; *Wright v. R. R.*, 155 N. C., 325; *Neal v. R. R.*, 126 N. C., 634; but not when such evidence is from the defendant: *Horne v. R. R.*, 170 N. C., 645; *Whitesides v. R. R.*, 128 N. C., 229; nor in cases of comparative negligence under section 3467: *Horton v. R. R.*, 157 N. C., 146.

The ruling of the court must defeat plaintiff's action; if any remedy is left, he should except, proceed with the case, and appeal: *Chandler v. Mills*, 172 N. C., 366. As to whether the judge, in his discretion, can allow plaintiff, after motion to dismiss, to introduce further testimony, see *Featherston v. Wilson*, 123 N. C., 623. Where judge intimates an opinion on the law which lies at the foundation of the action, adverse to plaintiff, or excludes evidence offered by plaintiff which is material, he may submit to nonsuit and appeal: *Merrick v. Bedford*, 141 N. C., 505; *Hayes v. R. R.*, 140 N. C., 131; *Hickory v. R. R.*, 138 N. C., 311; *Mobley v. Watts*, 98 N. C., 284; *Tiddy v. Harris*, 101 N. C., 589, and other cases in C. S., on page 567.

The plaintiffs now insist that there was ample evidence of a well defined, planned, and executed purpose to sell and appropriate plaintiffs'

tobacco on the part of Robertson, Wynns, and Godwin, and that luckily they were detected and caught up with while in the act—*olagranti delicto.*

The other exceptions are formal, taken to the refusal of a new trial and to the setting aside of the verdict. The action of the judge at the trial concludes as to these matters. There was no error committed in this respect that we can perceive.

After a full and particular review of the case, no error in the various rulings of the learned judge is found by us.

No error.

ARMSTRONG GROCERY COMPANY v. M. BANKS AND J. N. POTTER, TRADING AS M. BANKS & COMPANY, AND D. P. CASEY, TRADING AS CENTRAL GARAGE.

(Filed 7 March, 1923.)

1. Courts—Jurisdiction—Justices' Courts.

An action against a debtor and the alleged fraudulent purchaser of his goods and effects used in his business, as to the latter is not an action founded upon contract, and for the recovery of personal property or damage of concession thereof a justice of the peace has no jurisdiction when the sum of $125 is the amount involved.

2. Same—Superior Courts—Fraud—Equities.

The court of a justice of the peace is without jurisdiction to affirmatively administer an equity; and where the plaintiff has a cause of action at law against one of the defendants, coming within the jurisdiction of the justice's court, and seeks an adjustment of an equity founded on alleged fraudulent transactions with the codefendants, his having brought his action in the Superior Court is the choice of the proper jurisdiction, and the granting by the judge of the Superior Court of the defendants' motion to dismiss for the want of jurisdiction in that court is erroneous.

3. Same—Code Procedure—Multiplicity of Suits.

An action to set aside a sale of partnership assets by a solvent to an insolvent partner, and a sale to another as void against our statute regulating sales of merchandise in bulk, involves an adjudication upon an equity that is not cognizable by a justice of the peace, but only in the Superior Court, where alone the property can be followed and the full rights of the parties administered, and this is in conformity with our Code procedure requiring that all rights should be administered in one action, or suit, and a multiplicity of suits should be avoided.

4. Courts—Jurisdiction—Superior Courts—Equities—Law—Judgments—Remedies.

Under our Code and procedure the Superior Court has cognizance of both legal and equitable remedies, and a creditor may join in one action a proceeding to recover a judgment for the amount of his debt, and another

to subject property fraudulently disposed of by his debtor, to the payment thereof, and also may enforce his judgment by *mandamus* in proper cases; and he is not required as a prerequisite to the enforcement of his equitable rights that he must have first obtained his judgment in a separate action.

APPEAL by defendants from *Calvert, J.*, at the Fall Term, 1922, of PAMLICO.

Z. V. Rawls for plaintiff.
No counsel for defendants.

WALKER, J. This is a civil actoin which was brought in the Superior Court of Pamlico County for the purpose of obtaining equitable relief against the defendants, Potter and Casey, the amount involved being $125.03. His Honor, Judge Calvert, at the November Term, 1922, of Pamlico Superior Court, granted the defendants' motion to dismiss for want of jurisdiction. For two years or more previous to the above action, the defendants, M. Banks and J. N. Potter, were partners, trading under the firm name of M. Banks & Company, and while conducting their partnership business under the firm name of M. Banks & Company, became indebted to plaintiff for goods sold and delivered to the amount of $125.03.

On 1 July, 1921, the defendant M. Banks assigned to his codefendant, J. N. Potter, all his interest in said partnership property, alleging it to be for the security of $2,000, the defendant Potter permitting the partnership business to be continuously operated under its original name of M. Banks & Company, it being generally known that the defendant bank was totally insolvent. The partnership business consisted of the repairing of automobiles and the sale of various supplies and accessories used in the automobile business, including a lot of bolts, hardware, fan belts, and many other automobile supplies carried in stock by the defendant, M. Banks & Company.

On 18 July, 1922, the said defendants, M. Banks and J. N. Potter, still trading under the firm name of M. Banks & Company, sold to D. P. Casey all of said partnership effects in bulk, consisting of their entire stock of merchandise, automobile supplies, etc., without giving any notice to creditors, as required by law, or otherwise complying with the requirements of the statute.

The plaintiff in this action demands, as relief, that the transfer by M. Banks to his codefendant Potter of his interest in the said partnership effects be declared void as to their creditors, and that the sale by the defendants, M. Banks and J. N. Potter, trading as M. Banks &

Company, to the defendant Casey also be declared void, and each of the defendants be held liable for the indebtedness.

This action as to the defendants Potter and Casey is not founded on contract, and if it had been originally started in a court of a justice of the peace, that court would have had no jurisdiction. Revised Statutes, sec. 1474.) "The jurisdiction of our Superior Court is general and not limited, except in the sense that it has been narrowed from time to time by carving out a portion of this general jurisdiction and giving it either exclusively or concurrently to other courts. *Sewing Machine Co. v. Burger,* 181 N. C., 247. It has never been held here that equitable relief can be administered affirmatively by the court of a justice of the peace. The court of a justice of the peace has no jurisdiction by which it can affirmatively administer an equity. *Berry v. Henderson,* 102 N. C., 525; *Fidelity Co. v. Jordan,* 134 N. C., 236; *McAdoo v. Callum,* 86 N. C., 419; *Lutz v. Thompson,* 87 N. C., 334, 337; *Levin v. Gladstein,* 142 N. C., 482; *Bell v. Howerton,* 111 N. C., 69. Though a defendant in a justice's court may set up an equitable defense, *Levin v. Gladstein, supra; Lutz v. Thompson, supra,* as in such cases a justice has jurisdiction of equitable matters interposed by way of defense in actions properly cognizable upon them. *Bell v. Howerton, supra; Garrett v. Love,* 89 N. C., 205; *Lutz v. Thompson, supra; Cheese Co. v. Pipkin,* 155 N. C., 394. It has been held in other cases besides those cited by us that while the court of a justice of the peace is one for the enforcement of remedies merely legal, it may so far recognize an equity involved in any action pending before it as to permit it to be pleaded as a defense. *Bell v. Howerton, supra; McAdoo v. Callum, supra; Fidelity Co. v. Jordan, supra.* The case of *McAdoo v. Callum, supra,* will illustrate the distinction, in this respect, between equities affirmatively set up and those pleaded defensively. *Hurst v. Everitt,* 91 N. C., 399. See, also, *Bell v. Howerton, supra; Holden v. Warren,* 118 N. C., 326; *Vance v. Vance,* 118 N. C., 865; *Lutz v. Thompson, supra,* and *Levin v. Gladstein, supra.*

One of the most important purposes of the adoption of the Code system of pleading was to enable parties to determine and settle their differences in one action. The law favors the ending of litigation, and frowns upon the multiplicity of suits. Hence, whenever possible, in the construction of statutes this wise and wholesome policy should be observed. *Sewing Machine Co. v. Burger, supra.*

Plaintiff had not a safe, adequate, and effective remedy at law for the enforcement of his right, hence the jurisdiction of a court with equitable powers to administer the same and apply the proper remedy. Even if he could obtain judgment, issue execution, and levy it upon the property thus fraudulently disposed of by his debtor, and attempted to be put

beyond the reach of creditors, it was not a safe or adequate remedy, because the creditor must assume all the risk of satisfying his claim by a proceeding at law without obtaining full or effective relief, or the satisfaction of his debt, whereas, in equity or by a civil action in the nature of a suit in equity, under the present system of pleading, practice, and procedure, he can subject property, which has been fraudulently disposed of by the debtor, or attempted to be placed beyond the reach of his creditors, to seizure and sale for the payment of debts without incurring any such risk, and so that the property may be sold more advantageously and command its full value; whereas, if sold under a judgment and execution at law, before the fraud has been established and there is uncertainty as to title and clear right to sell, this beneficient result is not accomplished or attainable. It is settled, therefore, that the creditors may resort to either remedy, under the doctrine of election, and in this instance, having selected the equitable one, he may proceed therein to allege a fraudulent sale, have the same set aside, and the property subjected to sale under decree of the court for the satisfaction of his claim, and especially is this true under our present judicial system. *Harrison v. Battle,* 16 N. C., 537. And it is not now required that the debt should be first reduced to judgment, as a creditor may join in one action a proceeding to recover a judgment for the amount of his debt and another to subject property to the payment thereof, or to enforce his judgment by a *mandamus* in proper cases, *McLendon v. Comrs.*, 71 N. C., 38, as, under The Code and the present procedure the Superior Court has cognizance of both legal and equitable actions. *Dawson Bank v. Harris*, 84 N. C., 206. Of such an action as this one, the court of a justice of the peace has no jurisdiction.

It follows that the learned judge erred in dismissing the action, and for this reason the judgment is reversed and the case will further proceed below, according to law and the course and practice of the court.

Reversed.

H. F. LEAVISTER v. JESSE FRENCH & SON PIANO COMPANY.

(Filed 21 March, 1923.)

1. Negligence—Invitee—Licensee—Evidence—Questions for Jury—Trials.

Where the injury for which damages are sought in the action was received by the plaintiff in falling through an open trap door in the defendant's store while he was there for the purpose of purchasing merchandise, and the defendant contends it was at night, after business hours, and that the injury occurred in a part of the store set apart from customers; and there is evidence in plaintiff's behalf that the store was then

lighted and open for business, and he had gone, under the direction of the clerk, to a cabinet in which the goods he desired were kept, and the injury occurred while he was doing so, it was for the jury to decide, in considering the issue as to the defendant's negligence, whether the plaintiff, under the circumstances, was an invitee or licensee, and defendant's motion as of nonsuit was properly denied.

2. Same—Instructions—Appeal and Error.

In an action to recover damages for the negligence of defendant in causing a personal injury, involving the question whether the plaintiff was an invitee or licensee on that part of the defendant's premises where the injury occurred, an exception to the refusal of the judge to give the defendant's prayer for special instruction on that phase of the case is untenable on appeal, when it appears that the trial judge substantially incorporated the requested prayer in his general charge, and further instructed the jury that the plaintiff must show that, under the circumstances, he exercised due care in order to recover.

APPEAL by defendant from *Lyon, J.*, at October Term, 1922, of WAKE.

This is an action for damages for injuries sustained by defendant's negligence. He alleges that he went into defendant's store to purchase music rolls advertised in the window. The store was lighted, the door open. He made known his wishes to a salesman, who at the time was attending upon another customer, but who directed the plaintiff to a cabinet in the rear of the store a few feet away.

As the plaintiff approached the cabinet he fell through an open trap door in the floor and was injured. The defendant's defense was that the plaintiff came into the store after regular business hours and the trap door was not in that part of the store used by customers. The evidence was somewhat in conflict on this point. Verdict and judgment for the plaintiff. Appeal by defendant.

Douglass & Douglass and Pou, Bailey & Pou for plaintiff.
Burgess & Joyner, Oscar Leach, and Murray Allen for defendant.

CLARK, C. J. Upon the evidence the motion for nonsuit was properly refused. The defendant contended that the plaintiff was a mere licensee. The plaintiff contended that he was an invitee, and the jury so found.

Upon the defendant's own evidence, the store was open, lighted, doing business, and the appellee on coming in made known that he was there as an intending purchaser, and was so received. The issue as to whether the plaintiff was an invitee or a licensee was properly submitted to the jury. 20 R. C. L., p. 68, sec. 58. We have examined with care the exceptions to the charge and to the evidence, and cannot sustain them.

In *Ellington v. Ricks*, 179 N. C., 686, the Court quoted with approval from 20 R. C. L. as follows: "The authorities are entirely agreed upon the proposition that an owner or occupant of lands or buildings who

directly or by implication invites or induces others to go thereon and therein owes to such person a duty to have his premises in a reasonably safe condition, and to give warning of latent or concealed perils" (p. 55); and further, that "the owner or occupant of premises is liable for injury sustained by persons who lawfully enter thereon only when the injury results from the use and occupation of that part of the premises which has been designated, adapted, and prepared for the accommodation of such persons" (p. 67). In that case our Court said: "If an invitee goes to out-of-the-way places on the premises, wholly disconnected from and in no way pertaining to the business in hand, and is injured, there is no liability, citing *Glaser v. Rothschild*, 22 L. R. A. (N. S.), 1055, but a slight departure by him in the ordinary aberrations or casualties of travel does not change the rule or ground of liability, and the protection of the law is extended to him while lawfully upon that portion of the premises reasonably embraced within the object of his visit. *Monroe v. R. R.*, 151 N. C., 377." In the present case there was no warning of any latent or concealed peril from the open trap door, and the situation of the piano in that connection was a question for the jury, properly submitted.

The defendant insists particularly upon exception 20, contending that it was error not to charge the jury in the identical language of the prayer as follows: "The occupant of premises is liable for injuries sustained by persons who have entered lawfully thereon only when the injury results from the use and occupation of that part of the premises which has been designed, adapted, and prepared for the accommodation of such persons, and if the jury shall find from the evidence that plaintiff, at the time he stepped into the opening to defendant's basement was not in that part of the store which was designed, adapted, and prepared for the accommodation of defendant's customers, they will answer the first issue 'No,' even though the jury should find from the greater weight of the evidence that plaintiff was an invitee on defendant's premises at the time." The court, in stating the defendant's contentions, said: "The defendant contends that this cabinet was not opposite the trap door, but was beyond it, and contends there was a piano at the end of it and a piano at the side of it, so close together that a man could not get between the two without pulling one away, and contends that the plaintiff was not invited to go down there"; and then instructed the jury that unless they should find that plaintiff was invited in for purposes of trade, and an employee pointed him to the cabinet, and he fell into the trap door when he was exercising such care as a reasonably prudent man would use under such circumstances, to answer the issue "No."

This was more favorable to defendant than its instruction asked, for it required the jury to find that plaintiff was not only invited in, but

was directed to the space near the open trap door, and that he exercised due care. Under the instruction, as given, every fact upon which the instruction was prayed and refused is predicated. *Carter v. R. R.*, 165 N. C., 244.

Indeed, there was very little, if any, evidence that any part of the store was set apart from customers. It was a small room, the depth of the store being only 30 feet, and the cabinet only 18 or 20 feet from the front door. If the trap door was set apart from use by the public, there was nothing to indicate it. The pianos being goods for sale, invited rather than warned the customers. If there were two arranged in this instance, their arrangement may have served to conceal the trap door rather than to warn the customer, and probably cut off the light from the open trap. The music rolls being above the pianos, a customer to inspect them might be led into a fall much in the manner that wild beasts are trapped when the bait is suspended above the pit.

Upon examination of all the exceptions, without going into further detail, we think that the case was properly and fully presented to the jury, and we find

No error.

MRS. HATTIE CAUSEY AND HUSBAND, A. W. CAUSEY, v. J. C. DAVIS, AGENT AND DIRECTOR GENERAL, UNITED STATES RAILROAD ADMINISTRATION.

(Filed 21 March, 1923.)

1. Damages—Contracts—Torts—Consequential Damages.

Where the plaintiff claims damages in his action for breach of contract, those recoverable are such as were within the reasonable contemplation of the parties at the time the same was made; and if for a tort thereafter committed arising from the contract through the defendant's negligence in the performance of a public duty it owed the plaintiff, the damages recoverable for the commission of the tort are such as were the direct consequences thereof, and such consequential damages as may be reasonably and ordinarily expected to result from the tort at the time it was committed, under conditions that afforded the defendant a fair and reasonable opportunity of avoiding or preventing the additional damages claimed.

2. Same—Railroad—Train Connections.

A passenger on a railroad train with ticket purchased to destination on the same road, may not recover damages for failure to reach her destination in time to be with her father at her stepmother's burial, caused by her missing the usual connection *en route*, and her father's temporary absence from home when she arrived when such consequences were not made known by her to the defendant's agent at any time before the injury complained of occurred.

3. Same—Actual Damages—Additional Expense.

In this action by the plaintiff to recover damages caused by the defendant railroad company by delaying the arrival at destination of the plaintiff, a passenger on its train, by its failure to make its usual connection at a station *en route: Held*, the plaintiff can only recover, as damages for the defendant's default in making the connection, such additional cost of the trip as she may thereby reasonably have been required to pay.

APPEAL by plaintiff from *Daniels, J.*, at September Term, 1922, of LEE.

Civil action to recover damages for failure to transport *feme* plaintiff over the Southern Railroad Company from Sanford to Franklinville as per contract of carriage.

There was evidence on part of plaintiff tending to show that on 16 August, 1919, plaintiff boarded train of the Southern Railroad Company at Sanford, N. C., holding a ticket to Franklinville, in said State. That the route contemplated and provided for a change of cars at Climax, N. C., where plaintiff was to take another train to Franklinville, distant about 16 miles from Climax, this train being due to arrive at Franklinville about 5 p. m. That the first train was late when plaintiff took it, but according to schedule there was to be connection of the trains at Climax, and that per custom the second train awaited indefinitely at Climax for the arrival of the Sanford train. That when the Sanford train arrived the train for Franklinville had gone, and plaintiff, after some delay and inquiry, procured an automobile from Climax to Franklinville at an extra cost of $2.30.

Feme plaintiff claimed and testified that the chief purpose of her trip was to be with her father at Franklinville on the occasion of the death of her stepmother, and to attend the latter's funeral, which was timed to take place at 5 p. m. of the same day. That on finding the train for Franklinville had gone, plaintiff told the agent of her purpose in going to Franklinville, and the agent endeavored to have the train return for her, but without effect, and that by reason of the default of the company in not making its schedule, plaintiff was unable to be at the funeral, and on arrival found her father's home closed, he having gone out for the night to some neighbor's, and plaintiff was annoyed and distressed to her great damage, and had been made ill by her disappointment and inconveniences to which she was subjected, etc.

There was verdict for plaintiff, the damages under the court's instruction being restricted to $2.30, the extra charge in getting to Franklinville. Judgment, and plaintiff excepted and appealed, assigning for error the ruling of the court in restriction of the damages claimed.

Hoyle & Hoyle and Gavin & Jackson for plaintiff.

Seawell & Pittman for defendant.

HOKE, J. In an action of this character, a plaintiff may sue for a breach of the contract of carriage or in tort for a breach of duty imposed by the law. *Peanut Co. v. R. R.,* 155 N. C., 148; C. S., 3475, and cases cited.

Where the suit is for breach of the contract, the damages are such as were in the reasonable contemplation of the parties at the time the same was made, and when for tort recovery may be had for all the direct damages and such consequential damages as may be reasonably and ordinarily expected to result from such an injury at the time the same is committed. See *Penn v. Tel. Co.,* 159 N. C., 306. In estimating the amount of recovery for breach of contract, or for consequential damages occasioned by a tort, the claimant is properly restricted, as stated, to those that are the natural and probable results of his wrong, and if a plaintiff seeks to recover additional damages by reason of special circumstances, it must be shown that these circumstances were known to the parties in the one case at the time of contract made, and in the other at the time of tort committed, and under conditions that afforded the defendant a fair and reasonable opportunity of avoiding or preventing the additional damages claimed. This was the principle approved and applied in the *Peanut Co. case, supra.* In that case the special circumstances claimed as justifying an award of additional damages were not known to the parties at the time of shipment, and were therefore not competent in an action for breach of contract merely, but plaintiff offered to show that after the carriage of the goods was entered upon, and when they had reached the town of Rocky Mount, defendant company was fully informed of all the special circumstances calling for prompt delivery, and with that knowledge had negligently failed to forward the goods from Rocky Mount, or some intervening point, to their destination, and it was held that the evidence tending to establish these facts was competent on the question of damages.

But in the present case the damages in our opinion have been properly restricted whether the suit be treated as in contract or tort, there being no evidence offered that the railroad had any knowledge of plaintiff's purpose in going to Franklinville at the time she bought her ticket or took passage in the train at Sanford. Nor is there any evidence that the railroad was at any time informed of the purpose of plaintiff's journey in time to have corrected the alleged default or prevented the special damages claimed. *Development Co. v. R. R.,* 147 N. C., 503.

In any aspect of the matter, therefore, plaintiff can recover only the actual damages suffered, to wit, the additional cost of her trip. That being the only damages ordinarily to be expected from the default alleged, and there being no knowledge of any special circumstances affect-

ing the question of damages brought home to defendant in time to have prevented the additional injury complained of.

The cause, in our opinion, has been correctly tried, and the judgment is affirmed as entered.

No error.

HENRY W. CABE ET AL. v. BOARD OF ALDERMEN OF FRANKLIN ET AL.

(Filed 21 March, 1923.)

1. Municipal Corporations—Cities and Towns—Governmental Agencies—Legislative Control—Taxation.

Municipal corporations, including incorporated cities and towns to a large extent, are simply agencies of the State, constituted for the convenience of local administrations in certain parts of the State's territory; and in the exercise of ordinary governmental functions they are subjected to almost unlimited legislative control; and where not affected by special constitutional provisions, this position extends to the imposition of taxes raised for ordinary governmental purposes.

2. Same — Bonds — Diversion of Funds—Municipal Buildings—Water System.

The expenditure of the proceeds of the sale of the bonds of an incorporated town for the purpose of erecting a suitable municipal building for its offices, etc., and the expenditure of money for the extension of its waterworks system, are each for ordinary current expenses, not requiring a vote of the people; and where the act authorizing the issuance of bonds for the erection of the municipal building provides that the holders of the bonds are not required or charged with the duty of seeing to the application of the funds, the diversion of the money on hand derived from the sale of the bonds by the proper municipal authorities to the extension of the waterworks system, under statutory authority, does not contravene any constitutional provision or interfere with any private interest.

3. Same—Constitutional Law—Captions to Acts.

The provisions of our Constitution, Art. V, requiring that every act of the General Assembly levying a tax shall state the special object to which it shall be applied, and it shall be applied to no other purpose, does not extend to taxes levied by counties or incorporated cities or towns for general municipal purposes.

4. Same.

Where a valid issue of bonds under the approval of a majority of the qualified voters of an incorporated town was for the purpose of erecting or providing for its municipal building, with the coöperation of the county commissioners or a county memorial association, and upon the failure of this coöperation it was determined by the proper municipal authorities that the amount be inadequate and its expenditure alone for the purpose wasteful: *Held*, the proper authorities of the town, acting with legislative sanction, may divert the proceeds from the sale of the bonds remaining in the town treasury to the extension or enlargement of its waterworks system.

CABE *v.* BOARD OF ALDERMEN.

CIVIL ACTION, heard on case agreed, before *Lane, J.*, and by consent, at Waynesville, N. C., 17 February, 1923.

The action is to restrain the defendant board of aldermen of Franklin from diverting $10,000, proceeds of city bonds, now held in the municipal treasury, to other and different purposes from that contemplated and specified when the bonds were issued and sold.

On the hearing it was properly made to appear that under an act of the General Assembly, Public Laws, Extra Session, 1921, ch. 99, the board of aldermen issued and sold the bonds of the town of Franklin in the sum of $10,000 for the purpose of erecting or providing a municipal building for the town, and the proceeds of such bonds are now in the municipal treasury. That when this scheme was entered upon it was the plan and purpose of the municipal government to provide a building for public municipal purposes in conjunction with the county board of commissioners of Macon County, or with the Macon County Memorial Association, and by virtue of the proposed coöperation there was a reasonable assurance that the amount of $10,000 would suffice. That the plans for coöperation with the county and memorial association having miscarried, and it appearing that the $10,000 was insufficient to provide commodious quarters for municipal purposes, and that the amount required would at present be an extravagant and unjustified expenditure, the General Assembly of 1923 passed an act authorizing the board to apply said funds in their discretion to the following purposes:

1. The erection of a municipal building and firehouse as originally planned.
2. The erection of a firehouse.
3. The extension or enlargement of the waterworks system.
4. The extension of the sidewalks and streets of the town.

That pursuant to authority so conferred, the board of aldermen, deeming it inexpedient at present to go on with the municipal building, by formal resolution determined that an amount of said fund not to exceed $5,000 be and same is hereby diverted from the original purpose, and same be used to enlarge and extend the waterworks of the town. That plaintiffs and other citizens and taxpayers of the town being doubtful of the power to divert the funds, instituted the present action to restrain the proposed diversion.

The court, being of opinion that on the facts presented and under the legislative authority conferred, as above stated, the proposed diversion was lawful, so entered judgment that defendants go without day, and plaintiffs, having duly excepted, appealed.

Henry G. Robertson for plaintiff.
J. Frank Ray for defendants.

HOKE, J. The decisions of this State have repeatedly recognized and approved the principle that counties, townships, and other like municipal corporations, and to a large extent cities and towns, are simply agencies of the State constituted for the convenience of local administration in certain portions of the State's territory, and that in the exercise of ordinary governmental functions they are subject to almost unlimited legislative control, the position extending to the imposition and expenditure of taxes raised for ordinary governmental purposes, and where not affected by special constitutional provisions. *Trustees v. Webb*, 155 N. C., 379; *Jones v. Comrs. Madison County*, 137 N. C., 579-596; *Crocker v. Moore*, 140 N. C., 429; *Jones v. Comrs.*, 143 N. C., 59; *White v. Comrs.*, 90 N. C., 441; *Mills v. Williams*, 33 N. C., 558.

In the present instance it appears that the purpose for which these bonds were issued and sold, and that to which the proceeds are to be now applied are for ordinary current expenses, not requiring a vote of the people, and the original act contains the provision that the holders of these bonds are in no way required or charged with the duty of seeing to the application of the funds, so that there is no interfering constitutional provision, nor is there any private interest to be considered, the bonds being undoubtedly valid obligations of the town. *Hightower v. Raleigh*, 150 N. C., 569; *Tate v. Comrs.*, 122 N. C., 812.

True, we have held that without legislative sanction a municipal government may not of its own motion divert governmental funds from the purposes specified by the statutes under which they have been raised. *Comrs. v. Comrs.*, 184 N. C., 463. But here there is a valid statute authorizing the proposed diversion, and no reason occurs to us why it should not be upheld. Authority, too, here and elsewhere, is in full support of the measure. *Parker v. Comrs.*, 178 N. C., 92; *Brown v. Comrs.*, 100 N. C., 92; *Long v. Comrs.*, 76 N. C., 273; *Yamhill Co. v. Foster*, 53 Oregon, 124; 37 Cyc., 1588; 27 A. & E. (2 ed.), p. 868.

In the *Parker case, supra*, it is pointed out that our constitutional provision, Article V, section 7, requiring that "every act of the General Assembly levying a tax shall state the special object to which it shall be applied, and it shall be applied to no other purpose" does not include or extend to taxes levied by counties, etc., for municipal purposes, citing *Parker v. Comrs.*, 104 N. C., 166.

There is no error, and the judgment of the Superior Court is

Affirmed.

R. S. NEWSOM v. E. G. COTHRANE ET AL.

(Filed 21 March, 1923.)

1. Appeal and Error—Burden on Appellant—Claim and Delivery—Replevin—Sales—Value of Property—Seizure.

Where, in claim and delivery, the defendant has replevied and sold an automobile, the subject of the action, exception to the plaintiff's testimony of the value of the car, on the issues of plaintiff's damages because it does not appear that it related to the time of seizure, is untenable on defendant's appeal, it being required that he show error therein, which does appear of record on his appeal in this case.

2. Claim and Delivery—Value of Property—Corroborative Evidence.

Where the value of an automobile replevied by the defendant in claim and delivery is material to the inquiry in the action, proof of its value within a reasonable time before or after its seizure is competent as bearing upon its value at the time of its seizure; and a witness may testify that some months before the seizure he offered to lend a certain amount of money under mortgage thereon as corroborative of his testimony of its value at the time of the seizure.

APPEAL by defendants from *Lyon, J.*, at November Term, 1922, of WAKE.

This was a civil action for the recovery of the value of a motor car. Plaintiff alleged that while the car was under mortgage, he placed the same with defendants for the purpose of having it repaired. There was a dispute between the parties as to the amount and correctness of the repair bill. Plaintiff instituted ancillary proceedings in claim and delivery, gave bond; defendants replevied and, after due advertisement, sold the car under C. S., 2435.

The jury returned the following verdict:

"1. Is the plaintiff the owner and entitled to the possession of the car, as alleged in the complaint? Answer: 'Yes.'

"2. What is the value of said car? Answer: '$800.'

"3. What amount is plaintiff indebted to defendants for repairs on car? Answer: '$150.'

"4. Was the car bid in by Smith for the defendants when sold? Answer: 'Yes.' "

Judgment on the verdict for plaintiff, and the defendants appealed.

John W. Hinsdale for plaintiff.
J. W. Bailey for defendants.

STACY, J. The exceptions chiefly relied on by defendants are those relating to the admission of evidence tending to show the value of the car at the time of its seizure under claim and delivery in July, 1921.

The car had been in the defendants' shop for repairs. Plaintiff stated that it was worth $1,000. M. A. Lambert, witness for the plaintiff, testified that on 1 March, 1921, he had occasion to examine the car, and at that time he valued it at $900 or $1,000, and made a loan to the plaintiff, taking a mortgage on the car for $600 as security. Defendants contend that this evidence should have been excluded because the plaintiff's testimony relates to no particular time, and the witness Lambert could speak only of its value four months or more prior to its seizure. The jury found the value of the car to be $800.

The exception to the plaintiff's evidence cannot be sustained because it does not appear that he was speaking of the value of the car at any time other than the time in question, to wit, the date of seizure. Appellants must show error, and they must make it appear plainly, as the presumption is against them. *In re Ross,* 182 N. C., 478.

As a general rule, the value of property taken or destroyed is to be determined as of the time and place of its taking or destruction. *Hart v. R. R.,* 144 N. C., 91. But it has been held with us that proof of its value within a reasonable time before or after its conversion or destruction is competent as bearing upon its value at the time alleged. *Wyatt v. R. R.,* 156 N. C., 315; *Grant v. Hathaway,* 118 Mo. App., 604; 34 Cyc., 1505; 8 R. C. L., 489. What is a reasonable time, within the meaning of this rule, would seem to depend upon the circumstances of each particular case and the character of the property in question. *Page v. Fowler,* 39 Cal., 426.

In the instant case we think the testimony of the witness Lambert was properly admitted. What he said in regard to making a loan and taking a mortgage on the car as security therefor was admitted only in corroboration of his evidence tending to fix the value of the car at that time.

The other exceptions require no discussion. The judgment will be upheld.

No error.

BEN NOBLES ET AL. v. WILLIAM HAYWOOD DAVENPORT.

(Filed 21 March, 1923.)

1. Advancements — Evidence — Deeds and Conveyances—Questions for Jury—Trials.

The father conveyed certain lands to his daughter and certain other lands to his son, as advancements in 1905, and the son's deed was not registered. In 1910 he again conveyed the same lands to his son, reciting a consideration of love and affection and the sum of $700: *Held,* some evidence from which the jury could infer that the $700 was the enhanced value of the land during the intervening period over and above the in-

creased value of the advancement made to the daughter in 1905, and that it was the grantor's intention thus to equalize the advancements.

2. Appeal and Error—Second Appeal—Decisions—Law of the Case.

The decision of the Supreme Court on a former appeal is the law of the case in further proceedings in the Superior Court, where a new trial has been ordered, and also on a second appeal to the Supreme Court.

APPEAL by defendant from *Cranmer, J.*, at November Term, 1922, of LENOIR.

This is the second appeal of the same case, reported in 183 N. C., 207. The facts are there fully stated and need not be repeated here.

The jury returned the following verdict:

"1. Was the conveyance of the land from S. H. Davenport, the father, to his son, William H. Davenport, the defendant, an advancement to said defendant? Answer: 'Yes.'

"2. If so, in what amount was said conveyance an advancement? Answer: 'Full value in 1910, less $700.' "

Judgment on the verdict for plaintiffs, and the defendant appealed.

Rouse & Rouse for plaintiffs.
Cowper, Whitaker & Allen for defendant.

STACY, J. Defendant says there is no sufficient evidence appearing on the record from which the jury could find that the deed from S. H. Davenport to his son was intended as a partial advancement and a partial sale. We think there was some evidence to support the verdict. In 1905 S. H. Davenport and wife made an advancement to their daughter, Mrs. Dennie Nobles, of a 97-acre tract of land. At the same time they executed a deed, intended as an advancement, to their son, William H. Davenport, for a 102-acre tract of land. This latter deed was never registered; so, on 15 November, 1910, another deed was executed for the same property, reciting a consideration of natural love and affection and $700. There was some evidence from which the jury could infer that the $700 was the enhanced value of said property from 1905 to 1910, over and above the increased value of the advancement made to Mrs. Dennie Nobles in 1905; and that it was the intention of the grantor thus to equalize these advancements.

His Honor charged the jury in almost the identical language of our former opinion. The decision on the first appeal constitutes the law of the case, both in subsequent proceedings in the trial court and on a subsequent appeal here. *Harrington v. Rawls,* 136 N. C., 65; *Gordon v. Collett,* 107 N. C., 362.

After a careful perusal of the entire record, we are convinced that the case has been tried in substantial conformity to our previous decision.

No error.

R. B. ROBERTS v. E. A. MASSEY.

(Filed 21 March, 1923.)

1. Equity—Deeds and Conveyances—Correction of Instruments.

Where, by mutual mistake of the parties, a grantor of lands has failed to exclude from the conveyance timber standing thereon which he had previously conveyed to another, the grantee of the timber may maintain his suit in equity against the grantee of the land to correct the mistake in his deed.

2. Evidence—Issues—Verdict—Motion Set Aside—Answer to Issue—Appeal and Error—Objections and Exceptions.

Objection that the evidence on an issue is insufficient to support a verdict adverse to the appellant should be made in apt time during the trial, and exception comes too late after verdict to be considered on appeal.

3. Equity—Deeds and Conveyances—Correction of Instruments—Notice—Registration.

The requirement of registration of a deed, etc., to lands to give notice to purchasers, etc., excluding all other notice, however full or complete, applies necessarily to written instruments and not to the equity to reform a deed for the mutual mistake of the parties, which ordinarily rests in parol, and is not capable of registration.

4. Same—Timber Deeds—Extension of Cutting Period.

Where the grantee of lands brings action to recover damages of the defendant for cutting and removing timber therefrom, and the defendant claims this right under an extension of time granted from the common source of title, of which the plaintiff had full notice at the time he had acquired his title, the defendant may avail himself of the equity allowing a correction of the plaintiff's deed for the mutual mistake of the parties.

5. Appeal and Error—Evidence—Deeds and Conveyances—Title—Immaterial Matters—Verdict.

Held, under the facts of this case, the introduction in evidence of the defendant's deed to the timber standing on the lands, conveyed by a common source of title to the plaintiff, could not have prejudiced the plaintiff, who was found by the jury not to have the title to the timber, and plaintiff's exception thereto cannot be sustained on appeal.

6. Appeal and Error—Court's Discretion.

Where the trial judge has ruled on appellant's motions concerning matters in the exercise of his sound discretion, the appellant, to sustain his exceptions on appeal, must show an abuse of this discretion.

APPEAL by plaintiff from *Lyon, J.*, at November Term, 1922, of FRANKLIN.

The verdict was as follows:

"1. Did the defendant wrongfully cut and remove timber from the lands of plaintiff, as alleged in the complaint? Answer: 'No.'

"2. If so, what damages has plaintiff sustained? Answer: .....

"3. Was a clause excepting and reserving the standing timber with right to cut and remove the same on or before 9 May, 1921, omitted in the deed from W. R. Timberlake and other to R. B. Roberts by the mutual mistake of the parties to said deed? Answer: 'Yes.'

"4. If you answer the third 'Yes,' then what damages has the plaintiff sustained for the timber wrongfully cut under 8 inches, and other acts not covered by their contract? Answer: '$500.' "

Judgment for defendant; plaintiff appealed.

W. M. Person for plaintiff.
Ben T. Holden for defendant.

ADAMS, J. The land was formerly owned by W. B. Timberlake. After his death, in a proceeding duly instituted, the court appointed commissioners who sold the timber on this land by private sale to J. T. Wilson in 1916. The purchaser was granted three years from the date of the deed in which to cut and remove the timber. Wilson sold the timber to the defendant and the time for removing it was extended to 9 May, 1921.

On 15 October, 1919, the heirs at law of W. B. Timberlake sold to the plaintiff the land on which the timber was situated, and on 28 May, 1921, the plaintiff instituted this action to recover of the defendant the value of the timber he had cut. The plaintiff's deed was registered 6 March, 1919. In his answer the defendant alleged that the plaintiff had purchased the land, not only with knowledge that the time for removing the timber had been extended, but with the express understanding and agreement with the Timberlake heirs (under whom both parties claim) that title to the timber embraced in the defendant's contract was not to pass to the plaintiff, and that the clause excepting the timber was omitted from the plaintiff's deed by the mutual mistake of the parties. Upon denial and issues joined, the dispute was submitted to the jury, with the result shown in the answer to the third issue.

The equitable jurisdiction of the court was invoked by the defendant to correct a mistake in the deed to the plaintiff from his grantors, who were the common source of title, and was not denied, for it is a familiar doctrine that courts of equity will lend their aid for the correction of mistakes in written instruments to the original parties thereto, and to all those claiming under them in privity. 2 Beach on Mod. Eq. Jurisprudence, sec. 541. As to this doctrine, there is no controversy. But the plaintiff interposes to the validity of the judgment these two objections: (1) that there was no evidence of a mutual mistake as to the terms or exception alleged to have been omitted from the plaintiff's deed; (2)

that the plaintiff is protected by the Connor Act, even if such mistake be established.

The objection as to the sufficiency of the evidence was first raised on the plaintiff's motion to strike out the answer to the third issue, but not being in apt time, it could not then be entertained. An objection to the sufficiency of evidence is too late when first made after the verdict is returned. After voluntarily taking his chances with the jury, a party cannot be heard to say that the verdict was rendered upon inadequate evidence. *Shields v. Whitaker,* 82 N. C., 516; *Leggett v. Leggett,* 88 N. C., 114; *Hemphill v. Hemphill,* 99 N. C., 441; *Holden v. Strickland,* 116 N. C., 185; *Mica Co. v. Mining Co.,* 184 N. C., 491.

In support of the second objection, the plaintiff cites the Connor Act of 1885, now C. S., 3309, and several decisions in which it has been interpreted. The provision is this: "No conveyance of land, or contract to convey, or lease of land for more than three years, shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lies." In construing this statute the Court has repeatedly held that no notice, however full and formal, of an unregistered deed conveying land, or of an unregistered contract to convey land, or of an unregistered lease of land, for more than three years shall defeat or affect the rights of a subsequent purchaser for value whose deed is duly registered. *Quinnerly v. Quinnerly,* 114 N. C., 145; *Maddox v. Arp, ibid.,* 588; *Hooker v. Nichols,* 116 N. C., 157; *Collins v. Davis,* 132 N. C., 106; *Harris v. Lumber Co.,* 147 N. C., 631; *Wood v. Lewey,* 153 N. C., 401; *Lynch v. Johnson,* 170 N. C., 110; *Fertilizer Co. v. Lane,* 173 N. C., 184.

It will be noted that the question here presented is whether the Connor Act shall be held to defeat the application of the equitable doctrine of correction to a deed from which a clause excepting timber has been omitted by the mutual mistake of the parties. Several times the question has been discussed, but in this jurisdiction it has not definitely been decided. It was adverted to in *Wood v. Tinsley,* 138 N. C., 508; but there the Court declined to say whether the registration law is intended to protect a purchaser for value against equities or equitable titles arising out of parol trusts or attaching to the legal title by construction or implication. It is referred to again in the dissenting opinion in *Lynch v. Johnson,* 171 N. C., 631, in which it is said that the Connor Act deals only with such titles and rights as are evidenced by a writing which can be registered, and not to such equitable rights as rest in parol and are incapable of registration. And in *Pritchard v. Williams,* 175 N. C., 319, *Hoke, J.,* in a concurring opinion held that the registration laws do not apply to parol trusts. Referring to these laws, he said: "I am of opinion, however, that the act in question does not

apply to parol trusts, and in no way affects them, or the rules by which they are established and enforced. Drawn with intelligent care and foresight by our former *Associate Justice Connor,* now an honored member of the Federal bench, it was professedly designed and intended to affect priorities arising from registrations, and from its very nature and purpose, therefore, is restricted to written instruments capable of registration, and the act, in terms, applies only to "conveyances of land, contracts to convey, and leases of land for more than three years"—all required to be in writing by other sections of the same statute. I conclude, therefore, that these trusts, resting in parol and fully recognized by our law (*Jones v. Jones,* 164 N. C., 320; *Gaylord v. Gaylord,* 150 N. C., 222; *Avery v. Stewart,* 136 N. C., 436; *Shelton v. Shelton,* 58 N. C., 292; *Strong v. Glasgow,* 6 N. C., 289), are not within the meaning, terms, or purpose of the Connor Act, and will be enforced against the holder of the legal title unless it appears that such holder, or some one under whom he claims, has acquired such title for a fair and reasonable value and without notice of the trust. They were no doubt omitted from the Connor Act for the reason that, being recognized estates oftentimes of the greatest merit and incapable of registration because not in writing, it was considered unfair and subversive of right to destroy them in favor of one who had acquired his title with full notice of their existence."

This conclusion finds strong support, not only in the language, but in the manifest intent and purpose of the statute. In express terms the provision applies to conveyances, contracts to convey, and to leases for more than three years, neither of which can be enforced in law unless manifested by a written instrument which may be spread on the records as constructive notice to those who may be affected.

The statute, as we construe it, neither includes nor was intended to include equities which from their nature are incapable of registration for the reason that the circumstances out of which they arise generally, if not necessarily, rest in parol.

We therefore hold that his Honor was correct in refusing to interfere with the verdict on either of the grounds assigned by the plaintiff.

The plaintiff excepted to the admission of the Wilson deed on the ground that Wilson had no title, and there was no extension of the time limited for removing the timber. But according to the finding of the jury, the plaintiff is not entitled to the timber in controversy, and it is therefore immaterial with him whether Wilson's title was defective or perfect. For this reason his exception is without merit.

The remaining motions were addressed to his Honor's discretion, and in the absence of abuse are not the subject of review on appeal. We find

No error.

W. S. VANN AND H. B. FRYAR ET AL. V. THE BOARD OF COMMISSIONERS OF SAMPSON COUNTY, THE BOARD OF EDUCATION OF SAID COUNTY, AND N. A. WILLIAMS, SHERIFF.

(Filed 21 March, 1923.)

Schools—School Districts—Taxation—Special Tax—Enlargement of Districts—Elections—Majority Vote—Enlargement of Territory—Statutes.

The uniting of an existing special school tax district with other districts not having such tax is in effect the enlarging of the boundaries of the tax district to take in outlying nontax territory under the provisions of C. S., 5530; and it is only required for the establishment of the enlarged district and the levying of a special tax therein, that the district to be enlarged and the outlying territory, should each cast a majority vote in favor of the propositions submitted to them, and it is unnecessary that each of the nontax districts included in the enlarged territory should have separately cast a majority vote in favor of the special tax proposed, nor is it material that one of them was separated from the others by the original special tax district so enlarged. The importance of education upon the mental and moral conditions of the people in relation to self-government, commented upon by WALKER, J.

APPEAL by plaintiffs Vann and Fryar from order of *Cranmer, J.*, 12 September, 1922, from SAMPSON.

WALKER, J., stating the case: This is a civil action by the plaintiffs, W. S. Vann, H. B. Fryar, and others, against the board of commissioners of Sampson County, the board of education of Sampson County, and their respective members, and N. A. Williams, sheriff of Sampson County, to enjoin and restrain the collection of certain taxes, levied for school purposes, in a proposed enlarged or consolidated school district, comprising Ingold Special Tax District (which prior to the proposed consolidation had been levying for school purposes a tax of 30 cents on the $100 valuation of property and 90 cents on the poll), and Parker, Eureka, and Clear Run school districts, the latter three being nonlocal tax districts.

In May, 1921, the citizens of Ingold and Clear Run districts started a movement to consolidate the four districts mentioned above into one district, which included all the school districts in Lisbon Township, with the exception of Garland Special School District. They secured to a petition the names of the requisite number of voters, from Ingold and Clear Run districts, calling for an election in the entire territory, and their action being approved by the board of education of Sampson County, the board of commissioners of that county accordingly called an election to be held on 14 June, 1921, to vote upon the consolidation of the four districts, or rather the enlargement of Ingold District under C. S.,

5530, and to decide upon the question whether or not they should levy a tax of 30 cents on the $100 valuation of property and 90 cents on the poll in the three districts not heretofore having a special tax.

In said election all the voters in the four respective school districts were allowed to vote together upon the proposition submitted to them, the said election being held at Ingold, in the Ingold District, and all votes were placed in the same ballot box and were counted and tabulated together, and the result declared in the entire district as a unit, but it is not known how many votes for and against the question were cast in Ingold District and how many of such votes were cast in the outlying territory.

The Eureka District, a part of the new territory being taken in, was not contiguous to Parker and Clear Run districts, the same being separated from them by Ingold District. And in the election which was held, a majority of the voters in Eureka District voted against consolidation, and in Parker District no single voter signed the petition calling for an election, or voted for consolidation on the day of election.

The above are the facts so far as stated, but a more comprehensive and detailed statement was made by his Honor, Judge Cranmer, in his judgment, which was as follows:

This cause coming on for hearing before his Honor, E. H. Cranmer, judge, and being heard upon the notice to defendants to show cause why the temporary restraining order heretofore granted in this cause should not be continued to the final hearing; from the pleadings and affidavits filed herein the court finds the following facts, to wit:

1. That on the first Monday in May, 1921, a petition duly signed by one-fourth of the freeholders in a certain territory described in said petition as follows: "All of Lisbon Township, Sampson County, except the Garland Special Tax School District," which petition having been endorsed by the board of education of Sampson County, was filed before the board of education of Sampson; said freeholders praying in said petition that an election be ordered in said territory to ascertain the will of the voters therein as to whether there should be levied a special tax of not more than 30 cents on each $100 worth of property, and 90 cents on the taxable poll, to supplement the school funds, which may be apportioned by the board of education to said district in accordance with the provisions of law. Said petition, as copied on the minutes of the board of commissioners of Sampson County, is hereby referred to and made a part of this finding.

2. The territory described in the petition embraced the Ingold Special Tax District created in 1903, in which a special tax of 30 cents on the $100 valuation of property and 90 cents on the poll was in force, as well

as the districts of Parker, Eureka, and Clear Run, which were nonlocal tax districts.

3. All of said districts embraced in said territory were contiguous to each other, though Eureka District did not join the other two nonlocal tax districts, being separated therefrom by Ingold Special Tax District.

4. That said election was held on 14 June, 1921, at Ingold, North Carolina, in said Ingold District, at which time and place all the qualified voters in said proposed district were allowed to vote on said proposition, but all voted together, without regard to district lines, and no separate election was held in either Parker, Eureka, or Clear Run districts, or in the three districts as a unit, separate and apart from the Ingold District.

5. That at said election there was registered within said territory 190 qualified voters, 87 of whom were residents of Ingold District and 103 outside of said Ingold District; that of the 87 possible votes of Ingold District, 86 were cast for the special tax; and of the 103 votes outside of said Ingold District 66 were cast for special tax; though in Parker District no vote was cast for said special tax, and in Eureka District a majority was cast against the special tax.

6. That all the votes were cast in the same box, and were counted and tabulated together, without regard to district lines or the location of the parties casting them, and the result was declared on the whole territory.

7. That the result of said election was certified to the board of commissioners of Sampson County, and the said board then ordered the said district established in accordance with the result of said election.

8. That since said election and order the board of education, together with the school committee appointed for said proposed district, have contracted for the erection of a school building in said proposed district at the cost of approximately $16,500, and the said board of education and school committee have obligated themselves for said amount, and the building is now nearing completion, the sum of $16,000 having already been expended on said building.

9. That a tax of 30 cents on the $100 valuation of property and 90 cents on the poll was levied and collected for the year 1921, and a like amount has been levied for the year 1922, but none of it has been collected at this time.

10. That this action was commenced on 1 September, 1922, for the purpose of having declared null and void the said election held in said proposed consolidated district, and the order establishing said district, and for the further purpose of prohibiting the commissioners of the county from the further levy of taxes, under the election in the district,

and to prohibit the sheriff of the county from the further collection of said taxes.

Whereupon it is considered, ordered, and adjudged by the court that the temporary injunction or restraining order heretofore issued in this cause be and the same is hereby dissolved. Let the costs be taxed against the plaintiffs and the surety on their bond.

E. H. CRANMER,
Judge Presiding.

To the foregoing judgment the plaintiffs, in open court, except and appeal to the Supreme Court; notice waived, and bond in the sum of $50 adjudged to be sufficient.

It is hereby agreed by counsel that the pleadings, the judgment, restraining order, and entry of appeal shall constitute the record in this case.

E. H. CRANMER,
Judge.

ASSIGNMENTS OF ERROR.

The plaintiffs, W. S. Vann and H. B. Fryar, appealing, assign errors as follows:

1. For that his Honor was in error in dissolving the injunction and restraining order, and in refusing to continue it until the final hearing, and this error is the basis of plaintiffs' first exception.

2. For that his Honor was in error in signing the judgment set out in the record, and this error is the basis of plaintiffs' second exception.

Respectfully submitted,
FAIRCLOTH & FISHER,
Attorneys for Plaintiffs.

The above statement, somewhat more elaborate than the brief one preceding it, will give us a better and more accurate conception of the whole case, including the questions raised by the respective parties.

Faircloth & Fisher for plaintiffs.
H. E. Faison and Manning & Manning for defendants.

WALKER, J., delivering the opinion of the Court: This is practically, and in a legal sense, a case of enlarging a school district, that is, Ingold District, and while the words "consolidating districts" may not inaptly be applied to the process adopted, it nevertheless, in substance and effect, eventuates in an extension or enlargement of the boundaries of Ingold District, by including therein contiguous territory. There has been an election to determine whether this shall be done, which resulted in a majority vote being cast in its favor, both in Ingold District and in the

rest of the outlying territory or districts. Some question has been made in opposition to this enlargement, or consolidation, by whatever name we may call it, upon the ground that a part of the outlying districts, or those other than Ingold District, that is to say, Eureka District, is not contiguous to Parker and Clear Run districts, but this is not material, in the view we take of the facts and the law of the case, as the statute does not require that there shall be separate elections in each school district of the outlying and contiguous territory proposed to be annexed to the old or tax-paying district, but only provides that an election in such new territory may be ordered and held, . . . and in case a majority of the qualified voters "in such new territory shall vote at the election in favor of a special tax of the same rate as that voted and levied in the special-tax district to which the territory is contiguous, then the new territory shall be added to and become a part of the special-tax district," etc. It will be seen, therefore, that the vote is required to be taken in the "new territory," whether it happens to be composed of only one or of several school districts, and it can make no difference, when there are several of them, that they are not all contiguous to each other. If the Legislature had intended that there should be a separate vote in each district, it was easy to so have expressed it. And, again, the fact that some of the voters failed to vote, or absented themselves from the polls, was their own fault, and does not invalidate the election, there having been a clear majority of the qualified voters in favor of the measure, both in the old district and also in the new territory, and, of course, there was also a clear majority of the voters for the measure in the combined districts. Therefore, questions raised and decided in *Reiger v. Comrs.*, 70 N. C., 319; *Norment v. Charlotte*, 85 N. C., 387, and several other cases which might be cited, are not involved in this litigation, our present purpose being accomplished, when we decide, as we do, that the election, according to the facts found by his Honor, Cranmer, J., was regularly held and conducted, and that the measure submitted to the people received a majority at the polls in the new and outlying territory.

Referring to the case of *Riddle v. Cumberland*, 180 N. C., 321, and considering it in connection with two more recent cases, *Hicks v. Comrs.*, 183 N. C., 403, and *Perry v. Comrs.*, 183 N. C., 387, we need only say that the latter two cases have already been so sufficiently distinguished from the *Riddle case, supra*, as to require no further or additional comment by us upon the distinction between those cases, which has been so clearly drawn, and fixed by the opinion of *Justice Stacy* in the *Perry case, supra*. The *Riddle case, supra*, on the one side, and the *Hicks* and *Perry cases, supra*, on the other, are so entirely unlike in their special facts and the principles applicable to them that we might safely have left the dissimilarity between them to appear from the results in the

several cases themselves without being further made to appear by the sharp discrimination which was stated and, by forceful argument, demonstrated in the *Perry case, supra.* We may add that the learned counsel for the plaintiffs in this case have virtually recognized that distinction, and accepted it as having been finally determined.

It is of the first and last importance that there should be a settled and uniform construction of our school laws. The education of the people, mentally and morally, under just and effective laws, rules, and regulations, constitute the very foundation upon which must rest the development and success of our social fabric, and the happiness and prosperity of the people, and our Constitution recognizes this, and in proof thereof I trust that I may be permitted to reproduce here what I stated in *Collie v. Comrs.,* 145 N. C., 170, at pp. 179-180: "In Article IX the very first declaration is that religion, morality, and knowledge lie at the very foundation of all good government. And who can doubt the correctness of this proposition? They are the essential prerequisites, if I may so speak. Without intelligence, properly cultivated and directed, good government would be almost impossible, especially where the particular form of State policy depends so largely upon the will of the people as it does in a representative democracy. I may go further and assert that this principle is applicable generally to all forms of society, and lies at the foundation of all human institutions. Good government begins at the fireside, is nourished in the schoolhouse, and gradually developed in the council chamber and legislative halls, on the hustings, and in the forum, and refined, purified, and ennobled by the holy precepts of religion and morality as taught and inculcated in the sanctuaries of the people. What the State needs to make her great and prosperous are good minds and good men. She is apt always to have the beneficent influence of good women in her homes. Education, religion, and morality must be the cornerstones of all successful government." *Collie v. Comrs.,* 145 N. C., 179-180. This being so, an essential means to the proper, ready, and uniform enforcement of our school laws is a correct understanding of their provisions, and their meaning to the end that there may be uniform administration of these laws throughout the State by those charged with the supervision and government of our schools. Any disagreement as to the proper construction and meaning of the law might be fatal to this "due and uniform enforcement"—and enlightened administration of our educational affairs, and perhaps, also, disastrous to the schools themselves. We have had some proof of this in the past, but under the settled rulings of this Court, and the wisdom of the Legislature, much of the difficulty of administration arising from disagreement, and discord, and correct interpretation of the law has disappeared, and in its stead a more progressive and effective educational system has been estab-

lished, though we may add that some of the supposed discrepancies in the construction of our school laws, resulting in doubt as to their proper administration, were more seeming than real. The law, as it has been declared by this Court in former decisions, appears, at this time, to be well understood, as we observe that the election now being considered has been held and conducted with greater regard for the right of the people to be heard upon the question of taxing themselves for schools than seemed formerly to be the case.

Our conclusion is that the election was properly held, and that a legal majority has voted in favor of the creation of the new districts, and also of the taxation which necessarily follows from it. The general result is that there being no error in the rulings and decision of Judge Cranmer, we must affirm his judgment.

Affirmed.

O. W. EAKES ET AL. V. J. W. BOWMAN ET AL.

(Filed 28 March, 1923.)

1. Assignments for Benefit of Creditors—Debtor and Creditor—Insolvency—Preëxisting Debts—Mortgages—Deeds of Trust.

A deed of trust by an insolvent debtor to secure a preëxisting debt or debts, omitting others, though in the form of a mortgage with a defeasance clause, will be construed as an assignment for the benefit of creditors, requiring that the provisions of the statute on the subject to have been complied with for it to be valid; and this interpretation is not affected by the fact that a small portion of the debtor's property was not included in the assignment in this case, an equity of redemption ascertained to have no value.

2. Same.

The debtor, owning lands in two counties, gave a mortgage to secure the balance of the purchase price on the lands in the first county, and a second deed of trust on this land to another to secure borrowed money, which was sold under the first mortgage and found insufficient to pay it off. The debtor gave a deed of trust on the lands in the second county to secure preëxisting debts, attempting, also, to mortgage the crops to be grown thereon for three years; and later, and as further security, gave a mortgage on the crops to be grown thereon for a certain year. The property thus dealt with was practically all the debtor owned, and he was insolvent: *Held*, his mortgage of the land and crops in the second county was in effect an assignment for the benefit of his creditors, and for noncompliance with the statute void as to the unpaid balance due on the mortgages, and of the other creditors.

3. Actions—Parties—Bankruptcy—Trustees.

The trustee in bankruptcy may come in to an action brought prior to the adjudication by a creditor of the bankrupt, to the end that the rights of creditors, secured and unsecured, may be represented and their priorities determined by the final judgment in the action.

EAKES *v.* BOWMAN.

APPEAL by plaintiffs and defendant from *Calvert, J.*, at September Term, 1922, of PITT.

The question presented by this controversy is the priority of claims among the creditors of O. W. Eakes.

On 13 December, 1919, O. W. Eakes and another purchased from J. W. Bowman 700 acres of land situate in Lee County. At the time of the purchase he executed to the seller a deed of trust on said property to secure the payment of $32,000, the unpaid balance of the purchase price; and at the same time he also gave to E. R. Buchan, trustee, a second deed of trust on said land to secure the payment of $8,000, borrowed money. A year later, default having been made, Bowman foreclosed his deed of trust and secured a deficiency judgment against Eakes for $5,582.66. This left Buchan without any security, and it is conceded that at the time of default said property was not worth in value a sum sufficient to pay off the first deed of trust, and that at no time since has it been worth the amount of the Bowman debt. His Honor finds that Eakes' one-half interest in the equity of redemption in this property was worth nothing.

On 13 December, 1920, O. W. Eakes, being insolvent, executed and delivered to P. L. Clodfelter, trustee, a deed of trust on two tracts of land in Pitt County, and therein attempted to convey to said trustee the crops to be raised on said lands for a period of three years next ensuing. This instrument undertook to convey all the property of the said O. W. Eakes, except a small quantity of personal property in Pitt County already under mortgage, and his one-half interest in the equity of redemption in the Lee County land, ascertained to be of no substantial value.

The debts set out and recited in the deed of trust executed to Clodfelter, trustee—all preëxisting debts and amounting to approximately $39,000—were those styled on the argument as belonging to the Pitt County creditors. The accounts of Bowman and Buchan were not included in the terms of the instrument, and Eakes did not retain sufficient property to pay off the debts of Bowman and other creditors not mentioned in the deed of trust to Clodfelter, trustee.

On 14 August, 1922, J. W. Bowman, deeming said deed of trust to be invalid as against him, caused execution to be issued on his judgment, and the same was placed in the hands of the sheriff of Pitt County with the special request that immediate levy be made on the matured crops raised by O. W. Eakes during the year 1922, and on all personal property belonging to him in Pitt County. To circumvent this proceeding on the part of Bowman, O. W. Eakes, on 16 August, 1922, executed and delivered to P. L. Clodfelter, trustee, an instrument purporting to be a bill of sale for all the crops of every kind and description grown during the year 1922, on the two tracts of land in Pitt County, heretofore men-

tioned, consisting of tobacco, cotton, corn, etc., which had been levied on by the sheriff; the said Eakes reciting in said bill of sale that the same was for the further security of the indebtedness set out in the deed of trust, dated 13 December, 1920. At the time of the making of this bill of sale, O. W. Eakes was insolvent, and had no other property out of which Bowman's judgment could be satisfied. Eakes and Clodfelter then brought this suit to enjoin the sale of said property under execution.

It was adjudged below: "Upon the foregoing facts, the Court being of the opinion that the instrument of 13 December, 1920, was not a deed of assignment for the benefit of creditors, for the reason that at the time J. W. Bowman, the defendant, was substantially secured as to his debt by a deed of trust upon 700 acres of land in Lee County, which trust had not been foreclosed at the date of the trust to P. L. Clodfelter, but said instrument to said Clodfelter was a deed of trust, declines to set the same aside, except as to the crops therein attempted to be conveyed for the year 1922, but as to said crops for 1922 the said conveyance is void, and the motion of the defendant Bowman that said instrument of 13 December, 1920, be declared void and set aside is denied, except as to the 1922 crops therein attempted to be conveyed, and as to them said motion is allowed.

"And upon the foregoing facts, the court being of the opinion that the status of the debt due the defendant J. W. Bowman had been fixed and ascertained by judgment of 26 October, 1921, to be $5,582.66, for which he had no security, and the said Eakes being insolvent on 16 August, 1922, and having conveyed all of his property of every description to secure preëxisting debts in the instrument of 16 August, 1922, and having entirely omitted therefrom J. W. Bowman and other creditors and the trustee therein named having failed to comply with the statute with reference to assignments, the Court holds as a matter of law upon the facts found that the instrument dated 16 August, 1922, to P. L. Clodfelter, trustee, is absolutely void, and the same is hereby set aside.

That the defendant J. W. Bowman, by reason of the levy of 18 August, 1922, acquired a lien upon the property levied upon, and not laid off to the said O. W. Eakes as a personal property exemption, and the injunction heretofore granted herein forbidding a sale thereof be and the same is hereby dissolved."

To that part of the judgment which declares the instrument of 13 December, 1920, to be a deed of trust and not a deed of assignment, and to the refusal of the court to hold said instrument to be void on its face, the defendant J. W. Bowman excepted and appealed.

To that part of the judgment which declares the instrument of 16 August, 1922, to be void, the plaintiffs, O. W. Eakes and P. L. Clodfelter, trustee, excepted and appealed.

Plaintiff O. W. Eakes was declared a voluntary bankrupt on 18 November, 1922, and the action is continued against his trustee in bankruptcy, and P. L. Clodfelter, trustee, under the instrument of 13 December, 1920. The controversy, therefore, affects only the question of priority and distribution among creditors.

L. W. Gaylord, F. C. Harding, and Skinner & Whedbee for plaintiffs.
Hoyle & Hoyle, Gavin & Jackson, and Albion Dunn for defendant.

STACY, J., after stating the case: We concur in the view taken by his Honor with regard to the purported bill of sale executed on 16 August, 1922; and further, upon all the facts appearing on the record, we are of opinion that the instrument of 13 December, 1920, should be declared and held to be a deed of assignment for the benefit of creditors. It is conceded that under this holding said assignment is rendered void for want of compliance with the provisions of C. S., ch. 28. See *Odom v. Clark,* 146 N. C., 544, and cases there cited. True, the deed of assignment did not purport to convey the assignor's one-half interest in the equity of redemption in the Lee County land, but this, it appears from his Honor's finding, was of no value; hence, we apprehend the principle announced in *Brown v. Nimocks,* 124 N. C., 417, and *Bank v. Gilmer,* 116 N. C., 684; *S. c.,* 117 N. C., 416, should be held as controlling. In substance, the effect of these decisions was to declare that where an insolvent debtor makes an assignment of practically all of his property to secure one or more preëxisting debts, omitting others, such an instrument will be considered an assignment for the benefit of creditors, and held to be controlled by the statutes bearing upon the subject. This result was not changed in those cases simply because a small portion of the debtor's property was not included in the assignment, nor by virtue of the fact that the instrument was drawn in the form of a mortgage having a defeasance clause; and, for the same reason, we think the omission of an interest in an equity of redemption, admittedly of no value, should not be allowed to affect the result in the case at bar. *Odom v. Clark, supra; Powell v. Lumber Co.,* 153 N. C., 52.

The court, in declining to set aside the instrument of 13 December, 1920, for the reason that the defendant, J. W. Bowman, was "substantially secured," as to his debt by a deed of trust on the Lee County land, overlooked the fact that the Buchan debt of $8,000 was entirely unsecured. And while the Bowman debt at that time may have appeared to be substantially secured, yet as a matter of fact this appearance proved somewhat wanting in substance, as witness the deficiency later determined by suit.

The trustee in bankruptcy of O. W. Eakes, by permission and without objection, has intervened and made himself a party to this proceeding, to the end that the rights of the creditors, secured and unsecured, may be represented and their priorities determined by the final judgment in this action. *Garland v. Arrowood,* 172 N. C., 591.

From the foregoing it follows that on plaintiffs' appeal the judgment must be affirmed, and on defendant's appeal the judgment will be reversed.

On plaintiffs' appeal, affirmed.

On defendant's appeal, error.

WILLIAM WIMES ET AL. V. J. A. HUFHAM ET AL.

(Filed 28 March, 1923.)

Deeds and Conveyances—Registration—Notice—Mortgages—Judgments—Execution—Sales.

A sale of land under the execution of a judgment in the due course and practice of the court, and conveyance to the purchaser at the sale, regular in form and sufficiently describing the land, conveys the title superior to that of an unregistered deed from the judgment debtor to another, previously made, no notice, however formal, being sufficient to supply that required by registration; though a mortgage for the balance of the purchase price had been given by the grantee of the debtor, and duly registered before the docketing of the judgment, under the execution of which the conveyance had been made to the purchaser at the sale. C. S., 3309, 3311.

APPEAL by defendant, Rena Peterson, from *Sinclair, J.*, at February Term, 1923, of NEW HANOVER.

Civil action to recover of the defendants J. A. Hufham and wife upon their promissory notes, and to foreclose mortgage given to secure payment of same. The defendant Rena Peterson claimed to be the owner of the property covered by the mortgage, and asked that said mortgage be removed as a cloud on her title.

From a judgment and order of foreclosure in favor of plaintiffs, the defendant Rena Peterson appealed, assigning errors.

S. M. Empie for plaintiffs.

McNorton & McIntire and Weeks & Cox for defendant Peterson.

STACY, J. On 30 March, 1915, William Wimes, one of the plaintiffs in this action, being the owner in fee of the land described in the com-

plaint and covered by the mortgage sought to be foreclosed, conveyed the same by deed regular in form to the defendants J. A. Hufham and wife, Attie Lee Hufham, at and for the price of $3,000. The deed aforesaid was duly executed and delivered to the grantees named therein, but the same has never been registered in the office of the register of deeds for New Hanover County, the county wherein the land lieth. C. S., 3309. On the same date, 30 March, 1915, the defendants Hufham and wife executed and delivered to Wimes their three promissory notes, aggregating $2,000, and representing the unpaid balance of the purchase price of said land; giving as security for the payment of said notes a purchase-money mortgage on the property in question. This mortgage was duly registered the following day, 31 March, 1915.

Nearly two years later, on 21 February, 1917, L. W. Moore obtained a judgment against the said William Wimes and had the same docketed in the office of the clerk of the Superior Court for New Hanover County. Under an execution issued on this judgment, the land in question was duly sold by the sheriff of New Hanover County, on 4 April, 1917, to William Struthers, who became the last and highest bidder at said sale. Struthers obtained a deed from the sheriff for the land purchased by him and had the same duly registered in the office of the register of deeds for New Hanover County. Immediately thereafter, William Struthers and wife, by deed regular in form and for a valuable consideration, sold and conveyed the said land to Rena Peterson, who, after duly registering her deed, entered upon the land, and has since remained and is now in the possession thereof.

On 17 December, 1920, William Wimes sold and transferred the three promissory notes mentioned above to L. B. Mankim, but there was no assignment of the purchase-money mortgage given to secure the payment of said notes. This suit was instituted on 19 March, 1921, to recover on the notes and to foreclose the mortgage given as security for their payment.

We think it is clear from the above recital that the title of Rena Peterson to the land in question is superior to that of the plaintiffs. *Mills v. Tabor,* 182 N. C., 722.

It was admitted on the hearing that the judgment of L. W. Moore against William Wimes was regular in all respects; that the execution sale was properly and regularly made; that the deeds from the sheriff to William Struthers and from William Struthers and wife to Rena Peterson were properly executed, delivered, and registered; and that said deeds purport to convey the property described in the complaint by proper metes and bounds. Upon this admission, and under all the evidence, we think his Honor should have instructed the jury that Rena Peterson was the rightful owner of the property and entitled to a decree

canceling the mortgage in question, and removing same as a cloud on her title.

The Connor Act of 1885, now C. S., 3309, provides: "No conveyance of land, or contract to convey, or lease of land for more than three years, shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lies." This would seem to settle the matter against the plaintiffs' claim, so far as the mortgage in question is concerned. The quotation from the act of 1885 contains substantially the same language as that used in the act of 1829, now C. S., 3311, requiring the registration of mortgages and deeds of trust; and the uniform construction of this latter act has been to the effect that such instruments are of no validity whatever, as against creditors and purchasers for value, unless they are registered; and they take effect only from and after registration. *Bostic v. Young,* 116 N. C., 770. True, Wimes' mortgage was registered prior to the docketing of the Moore judgment under which the defendant claims, but there was no registered title in Hufham and wife to support the mortgage as against creditors and purchasers for value. *Mills v. Tabor, supra.* No notice to a purchaser, however full and formal, will supply the place of registration required by the statute. *Tremaine v. Williams,* 144 N. C., 116; *Quinnerly v. Quinnerly,* 114 N. C., 145.

It appearing that L. B. Mankim was a purchaser for value and a holder in due course of the notes sued on, the defendants J. A. Hufham and wife made no resistance at the trial against a judgment in his favor on said notes; and there is no appeal from this part of the judgment.

For the error in regard to the claim of Rena Peterson, there must be a new trial, and it is so ordered.

New trial.

WILLIAM M. LLOYD & COMPANY v. MARY E. POYTHRESS, ADMINISTRATRIX.

(Filed 28 March, 1923.)

Vendor and Purchaser—Account—Affidavit—Prima Facie Case—Evidence—Witnesses—Deceased Persons—Transactions—Statutes.

In an action by a corporation against the administratrix of the deceased to recover for goods sold and delivered to the intestate prior to his death, upon an affidavit attached to an account stated under the provisions of C. S., 1789, making such evidence prima facie evidence of the correctness of the account in an action thereon, it is required where objection is raised that the one making the affidavit be qualified as witness to make the state-

ment; and when he has made the affidavit as treasurer of the corporation it must be made to appear upon the face of the affidavit itself, or by evidence *aliunde*, that he was not disqualified for interest under the provisions of C. S., 1795, prohibiting testimony of transactions, etc., with a deceased person.

ADAMS, J., concurs in result; WALKER, J., dissents; CLARK, C. J., concurs in the dissenting opinion.

APPEAL by defendant from *Horton, J.*, at October Term, 1922, of VANCE.

Civil action, instituted by William M. Lloyd & Company, a corporation chartered under the laws of the State of Pennsylvania and doing business in North Carolina, to recover upon an open account for five carloads of lumber alleged to have been sold, shipped, and delivered, during the month of March, 1918, by and through plaintiff's office located at Charlotte, N. C., to defendant's intestate, J. S. Poythress, at Henderson, N. C. The only evidence offered on the hearing, and which was admitted over defendant's objection, was an itemized statement of the account, supported by the following affidavit:

Edward A. J. Evans, being duly sworn, says that he is treasurer of William M. Lloyd Company, a corporation duly created and organized under the laws of the State of Pennsylvania, and at the times stated in the annexed and foregoing account was doing business at Charlotte, in the State of North Carolina; that he is familiar with the books of account and business transaction of said corporation, and that the attached and foregoing account against J. S. Poythress of Henderson, North Carolina, is just and correct within the knowledge of this affiant, and the items therein charged and comprising said account were sold and delivered to the said J. S. Poythress at the prices and dates therein charged, at his special instance and request; that credit has been duly given and extend thereon for all payments and just and lawful offsets to which the account is entitled, and there remains justly due and unpaid thereon a balance of $526.71, with interest thereon from 1 April, A. D. 1918, for which payment has been demanded.

(Signed) EDWARD A. J. EVANS. [SEAL.]

Sworn and subscribed before me at Charlotte, State of North Carolina, this 28 September, A. D. 1922, as witness my hand and seal of office.

(Signed) HENRY GROSS,

My commission expires 18 January, 1925. *Notary Public.*

From a verdict and judgment in favor of plaintiff, the defendant appealed, assigning errors.

Thomas M. Pittman for plaintiff.

J. H. Bridgers for defendant.

STACY, J. Defendant objected to the introduction of the account and affidavit chiefly upon the ground that the affiant, being treasurer of the plaintiff corporation was disqualified to testify to the matters stated in the affidavit under C. S., 1795. In an action brought by a corporation against the executor or administrator of a deceased person, it has been held with us that an officer and stockholder of the plaintiff corporation is debarred from giving evidence of personal transactions or communications with the deceased, under the provisions of our statute disqualifying parties and persons interested in the event from being examined as witnesses in their own behalf. *Banking Co. v. Walker*, 121 N. C., 115. And this is in accord with the great weight of authority in other jurisdictions. 28 R. C. L., 508. See, also, note 9, Ann. Cas., p. 183, which contains a valuable collection of the authorities on the subject. At common law, a stockholder, being interested in the event of the litigation, was not allowed to testify generally in favor of the corporation. *C. H. Albers Commission Co. v. Sessel*, 87 Ill. App., 378, affirmed 193 Ill., 153; 61 N. E., 1075.

The defendant contends that under our statutes a treasurer of a business corporation is presumably a stockholder, and therefore interested in the result of an action to which the corporation is a party. C. S., 1144, provides that the directors of every corporation issuing stock shall be, at all times, bona fide stockholders of said corporation. C. S., 1145, provides that every corporation shall have a president, secretary, and treasurer, to be chosen either by the directors or by the stockholders as the by-laws may direct. It is further provided that the president shall be chosen from among the directors. From this it follows that the president must necessarily be a stockholder. This latter section also provides: "Any two of these offices may be held by the same person, if the body electing so determine." If any two of these offices may be held by the same person, it is the defendant's contention that presumably each officer possesses the necessary qualifications to fill any two of said offices. A treasurer or a secretary could not be elected to the office of president unless he be a stockholder. Hence, a treasurer, who is not a stockholder, could not hold the two offices of president and treasurer of the corporation. Defendant says "any two" means an indeterminate number of combinations that may be made from all, with none excluded. If a treasurer be not a stockholder, he would not be qualified to hold the office of president, and while he might be elected secretary and treasurer, yet he would not be qualified to hold any two of said offices. For the same person to be able to hold any two of these offices at one and the same time apparently requires that each officer shall be qualified to hold any one or more of said offices. It is conceded by the defendant that this does not follow as an absolute necessity—only as a presumption or as a

reasonable inference is her contention—for the statute may be construed to mean that the offices of president and secretary, or the offices of president and treasurer, may be held by the same person if the electing body so direct, provided he be a stockholder, while the office of secretary, or the office of treasurer, or the offices of secretary and treasurer may be held by one other than a stockholder. In electing a secretary, or a treasurer, the directors or the stockholders need not then be concerned with the qualifications of a president, but if they later wish to combine the offices of president and secretary, or the offices of president and treasurer, the same person then occupying the office of secretary, or the office of treasurer, could not be given the additional office of president unless he be a stockholder. It is the contention of the defendant that the treasurer or the secretary of a corporation, in order to be able to hold any two of the offices mentioned in the statute, should be qualified to hold the office of president. To do this, he must be a stockholder. Hence, the defendant concludes that, under our decisions, such an officer is presumably interested in the event of the action. Without deciding or expressing any opinion as to the merits of this contention, which is recited to show the basis of defendant's argument, we pass to the defendant's next position which we are constrained to believe should be resolved in her favor.

It was held in *Nall v. Kelly,* 169 N. C., 717, that an affiant who verifies an account which is to be received on the hearing and taken as prima facie evidence of its correctness under the provisions of C. S., 1789, must be regarded and dealt with as a witness *pro tanto,* and, to such an extent said affiant is subject to the qualifications and restrictions of other witnesses. If the person who makes the affidavit be not qualified as a witness to testify to the matters and things contained therein, in such case the account and affidavit, in the form as offered, should not be received in evidence.

The statute permits an *ex parte* affidavit to be offered as prima facie evidence of the correctness of the account, but we do not think it was the intention of the Legislature to permit one to speak by affidavit who otherwise would be incompetent to testify. Nor do we think it was the purpose of the Legislature to deprive the adverse party of his right to question the admissibility of such evidence. When the competency of a witness, or the admissibility of evidence, is in question, ordinarily the party opposing is entitled, as a matter of right, to a preliminary cross-examination of the witness whose competency is challenged or the admissibility of whose testimony is in dispute. *Woodworth et al. v. Brooklyn Elevated Railroad Co.,* 48 N. Y. S., 80; *Trussell v. Scarlett,* 18 Fed., 214, and note; Abb. Tr. Brief, pp. 126 and 245. Here the defendant is deprived of this privilege; no notice is given as to whose affidavit will be

offered and no opportunity is afforded the defendant for investigation. But it is said that the burden is on the party objecting to the competency of a witness, or to the admissibility of his testimony, to show his incompetency or the inadmissibility of his evidence. This is so, as a general rule, where the validity of the objection is not apparent (*Standley v. Moss,* 114 Ill. App., 612; 1 Greenleaf on Evidence, p. 435, sec. 390); but the basis of the present objection, to wit, the affiant's alleged interest in the event of the action, is a matter peculiarly within the knowledge of the plaintiff, and the defendant has had no opportunity to cross-examine the witness or to offer evidence of his incompetency or the inadmissibility of his affidavit. Indeed, it would be well-nigh impossible for the defendant to obtain such information except from the plaintiff or its witnesses; and it is a rule of practically universal acceptance that where a particular fact, necessary to be proved, rests peculiarly within the knowledge of a party, upon him the law casts the burden of proving such fact. *Hosiery Co. v. Express Co.,* 184 N. C., 478.

We have held that C. S., 1789, appearing as a section on the law of evidence, should be construed in subordination to C. S., 1795, under the principle announced in *Cecil v. High Point,* 165 N. C., 431, and other similar decisions; and in cases presenting the question, however meritorious a particular demand may be, when it involves a personal transaction or communication with a deceased person, the account must be established by proper evidence; and under the statute, as now drawn, an *ex parte* affidavit of the living should not be admitted over objection, unless it appear upon the face of the affidavit itself, or by evidence *aliunde,* that the person making the affidavit is not debarred from doing so by the provisions of C. S., 1795. *Nall v. Kelly,* 169 N. C., 717. Viewing the case in its larger aspect, we think this position is in keeping with a wise public policy and the intent of the Legislature as expressed in the two statutes now under consideration. The defendant's objection to the proof of account as offered should have been sustained.

We will not go farther and allow the defendant's motion for judgment as of nonsuit, at the present time; because, upon another hearing, the plaintiff may be able to make good all the allegations of its complaint. But for the error, as indicated, a new trial must be awarded, and it is so ordered.

New trial.

ADAMS, J., concurs in result *only.*

WALKER, J., dissenting: Being unable to concur in the opinion of the Court in this case, I will state briefly the reasons and grounds of my dissent. It does not appear *in this case* that A. J. Evans, who made the

affidavit as to the correctness of the account upon which the suit was brought, had any interest therein, or could in the least be affected by the result of the action. He is not within the terms or intent of the statute disqualifying persons as witnesses from testifying against the estate of deceased parties, that is, against executors or administrators of such parties, as to personal transactions or communications with them. So far as appears, Evans will not lose or gain anything however the action may terminate. He is but treasurer of the company bringing this action, and I know of no legal principle by which if the plaintiff prevails and gets a judgment he will be entitled to any part of the recovery, or how, if the plaintiff is cast in the suit, he will lose anything. He would certainly not be liable as treasurer, or otherwise, even for any part of the cost.

The case cited by the Court in its opinion (*Banking Co. v. Walker,* 121 N. C., 115) does not begin to sustain the contrary view of The Code, sec. 590. In that case *Justice Montgomery,* who delivered the opinion of the Court, is careful to state and to repeat that the witness, who was the cashier of the plaintiff bank, and whose testimony was excluded because of his interest in the event of the action, was not only cashier of the plaintiff bank, *but a stockholder,* and it is perfectly apparent that the ruling of the Court excluding his testimony was based on the latter fact alone. So that *Banking Co. v. Walker, supra,* so much relied on by the Court to support its position, wholly fails to do so.

The reasoning by which the Court comes to the conclusion that because the president of a corporation is required to be a stockholder, and that any two offices of the corporation may be held by the same person, it follows that a treasurer may be a stockholder, and this being so, it follows that the presumption must be that he is one, but this is a complete *non sequitur.* Such assertion does not logically or legally lead to the conclusion reached by the Court. The president must be a stockholder in order to hold that office, but this does not mean, or *begin to prove,* that if the company consolidates two offices, president and treasurer, the latter must also be a stockholder, because there is no restriction on the company to associate a nonstockholding officer with one who owns no stock, and is not required to own any. It seems to be conceded, or, at least, should be, that the officer making the affidavit of the correctness of the account must be a stockholder in order to be interested in the event within the meaning of the statute. The mere fact that he is an officer does not in any sense make him interested in the event of the action, for no judgment can be entered for him or against him that will in the least affect his personal interests, but that is not enough. He may have a sort of sentimental interest, if that, but that is not enough, and that is certainly all that he can have. And, again, I am compelled to

say that the argument by which the Court reaches the conclusion that this power to unite two offices disqualifies the treasurer, who has no stock, when joined with the president, is also a complete *non sequitur*, and surely the conclusion cannot be warranted on the ground assumed. I have referred above to the *conclusion* of the Court in this branch of the case as being a *non sequitur*, and it is rightly so denominated, when this part of the opinion is considered with what immediately follows, because the last part and the conclusion are inseparably connected with the first part, and, in fact, are unmistakably based upon it, but neither can stand without the help and assistance of the other.

The last proposition is clearly untenable. The Court says: "The statute permits an *ex parte* affidavit to be offered as prima facie evidence of the correctness of the account, but we do not think it was the intention of the Legislature to permit one to speak by affidavit who otherwise would be incompetent to testify. Nor do we think it was the purpose of the Legislature to deprive the adverse party of his right to question the admissibility of such evidence." In this connection we may safely concede the correctness of the proposition stated there, that the Legislature did not intend to permit one to speak by affidavit who is incompetent to testify, nor to withdraw the right of the adverse party to make proper objection to the admission of incompetent evidence. But one of the conclusive answers is that the Legislature has done no such thing. The defendant has the right and the opportunity, by proper procedure, to make due objection to any incompetent testimony. But that does not mean that he has the right, or should have it, to place the burden on the party who offers testimony to show primarily that it is competent, for this would violate every rule of evidence we have ever heard of, as testimony offered, at least such as is apparently competent, must be admitted unless proper objection is made to it and supported by the facts, which every rule as to the burden of proof requires should rest upon the objector, he who is the actor and affirms and not he who refutes, denies, or is silent, and occupies merely a defensive position. If it be true that the objector is entitled to demand the presence of the witness so that he may conduct a preliminary inquiry and cross-examine him, as to his competency, it is perfectly clear that the statute would be practically nullified, or come to naught, as that was what the law was intended to avoid. The extreme position taken by the Court in this respect would require all persons having knowledge of the facts, or likely to have such knowledge, to be present when the affidavit is offered, that they be examined as to its admissibility. This would, of course, be in violation of the spirit and purpose of the statute, and entirely destroy the benefits intended to be conferred by it, besides, ignoring every known rule of

evidence upon the subject. It would, besides, require the party offering the evidence to do precisely what the statute was intended to prevent.

The principle of *Hosiery Co. v. Express Co.,* 184 N. C., 478, may be easily conceded, and yet the argument and conclusion drawn from that principle is this, that when a particular fact, necessary to be proved, lies peculiarly within the knowledge of one of the parties to the controversy, upon him is cast the burden of proving such fact. But I do not believe it will be asserted, at least not successfully so, nor that we have ever been taught, that where one party offers evidence, he must go further and show that his evidence is competent before it will be heard. That is going entirely too far, and has no authority to support it.

But the statute simply requires that an affidavit, such as was made in this case, shall be sufficient, without anything else, to constitute a prima facie case, and when we require more to be done, we are simply legislating and not construing the statute, or declaring what the law is. If the law is wrong or unjust, or inadequate to protect rights, let the Legislature correct by amendment, and not we by forced construction or arbitrary doctrine, having no legitimate reason to justify it. I do not contend, of course, that incompetent testimony should be admitted, and there is a sufficient remedy for its exclusion if it is offered. If defendant had objected and alleged that the evidence proposed to be introduced was incompetent as a transaction by an interested witness with a deceased party, and also alleged that he was not able to show it for lack of time and opportunity to do so, no court would deny his (or her) request for reasonable time and opportunity to make the objection good, and, if it did, I may safely assert that this Court would not sustain any such ruling. But to sustain the objection in its present form would be simply to refuse enforcement of the law as written (*ita lex scripta est*), and the mandate of the Legislature, which would be wrong and an invasion of the legitimate function of the legislative department. Whether the law is just or not, or needs amendment or reformation, is not our concern, and, to speak plainly of it and in common parlance, "is none of our business." We can only inquire what the law is, and not what it should be, and it is our imperative duty to enforce it as we find it.

As has been well said: "It may safely be laid down that the less the process of inquiry is fettered by rules and restraints, founded on supposed considerations of policy and convenience, the more certain and efficacious will it be in its operation. Formerly the very means devised for the discovery of truth and advancement of justice were not infrequently perverted to the purposes of injustice, and made the instruments of the most grievous and cruel oppression. It is to be hoped not only that those imperfections which still subsist, which have been spared from their antiquity, and exist as a kind of prescriptive evil, will in time be

removed by legislative, if they be beyond the reach and scope of judicial, authority. 'The rules of evidence,' said *Lord Ellenborough*, in *Pritt v. Fairclough* (3 Camph., 305), 'must expand according to the exigencies of society.' The admission of every light which reason and experience can supply for the discovery of truth, and the rejection of that only which serves not to guide, but to bewilder and mislead, is the great principle that ought to be the foundation of every system of evidence. Common experience rather than technical rules should be adopted as the test. Mercantile and industrial life, producing, as they do, nearly all the transactions of men that come before the courts of law and equity, are essentially practical. That which is the final basis of action, of calculation, reliance, investment, and general confidence in every business enterprise, may safely, in general, be resorted to to prove the main fact. The courts need not discredit what the common experience of mankind relies upon. *Judge Cooley* once said that 'courts would justly be the subject of ridicule if they should deliberately shut their eyes to the sources of information which the rest of the world relies upon.' Lastly, wherever there is any serious doubt in the law as to whether certain proof is or is not permissible, a safe rule to pursue is to permit the testimony to go to the jury." 10 R. C. L., pp. 861-862. It has also been said that "in assailing a prima facie right, the party must aver and prove facts sufficient to overcome it; otherwise, he cannot ordinarily put the defendant to the proof of a perfect indefeasible title or right. And it makes no difference as to the point of burden of proof that the evidence to rebut the demandant's prima facie right comes in part or wholly from the defendant's witnesses on cross-examination." 10 R. C. L., p. 899, sec. 48; *Foster v. Hall*, 12 Pick. (Mass.), 89 (22 Am. Dec., 400); *Hardman v. Cabot*, 60 W. Va., 664; 9 Ann. Cases, 1030; 7 L. R. Anno. (N. S.), 506.

The cases cited by the Court (*Cecil v. High Point*, 165 N. C., 431, and *Nall v. Kelly*, 169 N. C., 717) have, I must most respectfully say, no bearing upon or relevancy to the points in this case. It is a very "far cry" from them to this case, or from this case to them. They are all altogether different, and no legitimate deduction, or inference, can be drawn from them that would in any aspect support the contention as stated in the Court's opinion. The statute, and its meaning, are so plain and simple that he who runs may read and know what the law is, as enacted by the Legislature. Our duty is also simple, and demands faithful obedience to its plain mandate. It was passed so as to abolish what was deemed to be a great injustice imposed upon a creditor in collecting his just debt, when he was required, at undue cost and expense, to establish his case before a justice or court. It makes the affidavit only prima facie evidence, and requires more proof when it is seriously con-

tested, unless the plaintiff is willing to take the risk of losing his case. To adopt the rule and procedure I have suggested would fully protect the debtor and work no injustice to the creditor, and I believe that it should be declared as the law and the rule of decision in this case.

For the reasons given by me, I dissent from the opinion and judgment of this Court.

CLARK, C. J., concurs in the foregoing dissenting opinion of WALKER, J.

MATTIE BELL MOORE, ADMINISTRATRIX, v. ATLANTIC COAST LINE RAILROAD COMPANY.

(Filed 28 March, 1923.)

1. Employer and Employee—Master and Servant—Negligence—Railroads—Presumptions—Evidence—Questions for Jury—Trials.

The ordinary presumption that one who is in possession of his faculties, walking on a railroad track, will step to a place of safety on the approach of the train does not apply to an employee standing on the track absorbed in the performance of a duty he owes to the railroad company; and where the plaintiff's intestate was the head brakeman of the railroad company, absorbed in his duties of checking and directing from a list cars being placed by the freight train to which he was attached upon the siding to be left at a station, and there is evidence that he was struck and killed by another train of the defendant, passing over the track upon which he was standing; and that the engineer on this train had a clear and unobstructed view, and could, by keeping a proper lookout, have avoided killing him, but the train approached without signals or warning; the question of defendant's actionable negligence upon the issue of the last clear chance was for the determination of the jury, and defendant's motion as of nonsuit was erroneously allowed.

2. Employer and Employee—Master and Servant—Railroads—Assumption of Risks—Employers' Liability Act—Statutes—Defenses.

Under the provisions of the "Employers' Liability Act," C. S., 3467, contributory negligence is not a defense in the employee's action against a railroad, but requires an apportionment of liability; and the Federal act has no application where the negligence of a fellow-servant, which the injured one could not have foreseen or expected, was the sole, direct, and immediate cause of the injury.

APPEAL by plaintiff from *Devin, J.*, at February Term, 1923, of CUMBERLAND.

This is an action by plaintiff for damages for the wrongful death of the intestate, who was her husband. He was head brakeman on defendant's local freight train between Fayetteville and Smithfield and was run

over and killed by a north-bound extra, consisting of locomotive and caboose, while he was standing about 500 yards north of the station on the end of the crossties on the west side of the north-bound main-line track. He was standing there in order to get a proper view of the cars as they came out of the spur track, so that he could check off the same, and was deeply engrossed and absorbed in studying a paper on which was written a list of the cars to be shifted, and while the engine of his own train was close by, engaged in shifting these cars on the west side, in which direction he was facing. It was about 4 o'clock in the afternoon, and the engineer of the extra had a clear view of intestate for 400 or 500 yards, but blew his whistle only once for the crossing south of the station.

The court allowed a motion of nonsuit, and the plaintiff appealed.

Dye & Clark for plaintiff.
Rose & Rose for defendant.

CLARK, C. J. In *Lassiter v. R. R.*, 133 N. C., 244; *Smith v. R. R.*, 132 N. C., 819, and *Peoples v. R. R.*, 137 N. C., 96, the distinction is clearly recognized between the presumption which arises when a person in the apparent possession of all his faculties is seen walking on the track and the duty owed to one of the railroad employees who is absorbed and engrossed in his work. In the *Lassiter case, supra*, the conductor of a freight train had his back to an approaching shifting engine, and while engaged in giving orders to his men on his own train, stepped in front of the box cars attached to the shifting engine and was run over and killed. The Court held that it should have been left to the jury on the issue of the last clear chance, as defendant was negligent in having no watchman to notify the engineer of the shifting engine, for it is the duty of the defendant company to keep a lookout.

On page 249 of that case, it is said in words very applicable to this case: "The intestate was at a disadvantage, was not upon equal opportunity with the defendant to avoid the injury, for his manner and conduct showed that he was oblivious to his surrounding and was engrossed in the management of his train and his crew, . . . his action showed that he did not hear the bell ringing, . . . the condition of the intestate was as helpless as if he had been asleep or drunk on the track, and the defendant owed him at least as high a duty as if he had been asleep or drunk."

In *Smith's case, supra*, he was engaged in painting switch targets on the track when injured by a passing engine, and it was held, citing numerous cases from other states, that it was the defendant's duty to avoid injury to its servants while engaged in work in the yard.

In *Peoples' case, supra,* there was evidence that at the time the intestate was killed he was in the discharge of his duties as an employee of the defendant, "with his mind absorbed in the attempt to mount a shifting engine coming toward him."

In *Ray v. R. R.,* 141 N. C., 84, the *Lassiter* and *Smith cases, supra,* are cited with approval, and it is said: "The authorities are to the effect that when the plaintiff (or intestate) was at the time rightfully upon the track, or sufficiently near it to threaten his safety, and is negligent and so brought into the position of peril, if the defendant company, by taking proper precautions and keeping a proper lookout, could have discovered the peril in time to have averted the injury by the exercise of proper diligence and negligently fails to do so, then defendant would still be responsible, although the plaintiff may have also been negligent in the first instance," citing *Lassiter v. R. R., supra.*

In *Brown v. R. R.,* 144 N. C., 634, a recovery was allowed to a section hand who was injured on the track, and whose position was such as to indicate he was insensible to the approaching engine which struck him.

In *Davis v. R. R.,* 175 N. C., 652, it is said the *Lassiter case, supra,* had been approved ten or twelve times.

In *Pickett v. R. R.,* 117 N. C., 616, it is said: "It is settled law in North Carolina that it is the duty of an engineer on a moving train to maintain a reasonable vigilant outlook along the track in his front, and the failure to do so is the omission of a legal duty. If, by the performance of that duty, an accident might have been averted notwithstanding the previous negligence of another, then under the doctrine of *Davies v. Mann,* 10 M. and W., 545, and *Gunter v. Wicker,* 85 N. C., 310, the breach of duty was the proximate cause of any injury growing out of such accident, and when it is a proximate cause the company is liable to respond in damages. Having adopted the principle that one whose duty it is to see does see, we must follow it to its logical result." All these cases, except one, were before the adoption of the present "Employers' Liability Act," Laws 1913, ch. 6; C. S., 3467, under which contributory negligence is no longer a defense, but simply requires an apportionment of the liability, and, therefore, in any view, it was error to direct a nonsuit on that ground. *Davis v. R. R.,* 175 N. C., 648. Besides, the burden to prove contributory negligence is on defendant. Laws 1887, ch. 33; C. S., 523.

In *Collins v. R. R.,* 124 Ga., 858, it is said: "It certainly cannot be decided as a matter of law that the negligence is upon the part of the laborer engaged in a physical burden that taxes his strength if for a few moments he permits himself to become engrossed in his task and oblivious to possible dangers."

In *Bluedorn v. R. R.*, 108 Mo., 449, it is also held that when a switchman is injured through stepping onto an adjacent track and being run over, the question of his contributory negligence is for the jury, which has the right to take into account the fact that he was necessarily engrossed in his duties.

An employee of a contractor, at work for a railroad company, in *Goodfellow v. R. R.*, 106 Mass., 601, was held not culpable in being so engrossed in his work of holding the guy of a derrick that he failed to notice the approach of an engine. To same purport, *Tobey v. R. R.*, 94 Iowa, 256; 33 L. R. A., 496.

In the case at bar the engineer of the extra could see more than a quarter of a mile. It was a reasonable inference that he saw Moore studying his switch list, standing on the ends of the crossties on the west side of the north-bound track, facing his own shifting engine, which was to the north of him, thus putting the intestate's back partly towards the extra. The engineer could therefore have seen him until he got so close that his view was obstructed by his own locomotive, but even that did not relieve the defendant of the duty to keep a lookout on the left side, where the fireman sits. *Arrowood v. R. R.*, 126 N. C., 631. Before his view was shut off the engineer of the extra could have heard the other engineer give the four short blasts on his whistle and see that Moore without looking up gave him a signal. Bishop, the engineer of the extra, also could see that Patterson did not move his train back and drop a car in the clear in response to that order. In short, he could have seen that Moore, the intestate, was engaged in directing the shifting of the cars from the spur track, and that he was engaged in studying the list in his hand for that purpose.

Yet, with this knowledge, the engineer of the extra neither blew the danger signal of the extra nor slackened his speed.

The engineer of the extra had given only the crossing blow, 500 yards away. There is no evidence that the bell was ringing on the extra, which was running light, at a speed of 30 to 35 miles an hour past the station and in the yard at Smithfield, where persons were to be expected, and where the local freight could be seen by Bishop and his fireman for several hundred yards. Having passed the caboose near the tank they knew the freight's crew were engaged in shifting near a point which they had to pass with the extra. The whistle cord was in reach of the hand of the engineer of the extra, the bell cord was close to the fireman, yet they took a chance with another man's life and lost.

The assumption of risk is not recognized as a defense in this State under the Employers' Liability Act. *Gaddy v. R. R.*, 175 N. C., 520, citing *Ware v. R. R., ibid.*, 501; *Kinney v. R. R.*, 122 N. C., 961.

The doctrine of assumption of risk, although not entirely abolished by the Federal Employers' Liability Act, has no application where the negligence of a fellow-servant, which the injured party could not have foreseen nor expected, is the sole, direct, and immediate cause of the injury. *Reed, Admx., v. Director General,* U. S. Supreme Court, filed 27 February, 1922.

The judgment of nonsuit must be

Reversed.

THOMAS E. VINSON v. J. H. GARDNER.

(Filed 28 March, 1923.)

Estates—Fee Tail—Statutes—Fee Simple—Contingent Remainders—Defeasible Fee.

An estate to testator's daughter N. for life, and to the lawful heirs of her body, creates an estate tail converted by our statute into a fee simple; and a further limitation "and if she should die leaving no heirs, then the lands to return to the G. family," gives N. a fee defeasible upon her death without issue, children, etc., C. S., 1737, and on her death, leaving children surviving, they take an unconditional fee, and can make an absolute conveyance thereof.

CONTROVERSY without action, heard before *Allen, J.,* at November Term, 1922, of WAYNE.

It appears that plaintiff, having contracted to sell to defendant a certain tract of land in said county containing 108 acres, and to make to defendant a good title to same, seeks to recover purchase price. Defendant, admitting the contract, resists recovery on the ground only that plaintiff is not in a position to make a valid title. On the facts presented there was judgment for plaintiff, and defendant excepted and appealed.

No counsel for plaintiff.

D. H. Bland for defendant.

HOKE, J. The title offered depends upon the terms and meaning of a clause in the will of Edmund Grant, deceased, duly proven and recorded in the county of Wayne, said clause and the facts pertinent to its correct interpretation being set forth in the case agreed as follows:

" 'I give and bequeath to my beloved wife, Sally Grant, and my beloved father, Daniel Grant, all of my real estate during both of their lives. I also give to them all my personal property of every description during their lives except one cow and calf and one sow and pigs—that cow and calf and sow and pigs I give to my nephew, Henry Sasser.

After the death of my wife and father, I loan to my daughter, Nancy K. Vinson, the real estate during her life and to the lawful heirs of her body, and if they should all die, leaving no heirs, then the real estate shall return to the Grant family.'

"That Daniel Grant, the father of Edmond Grant, to whom a life interest in said lands was devised under said will, died a few years after Edmond Grant; that Sallie Grant, the widow of Edmond Grant, died in the year 1913, and held possession of said lands up to the time of her death; that Nancy K. Vinson, mentioned in said will, was the wife of Ben Vinson, and was the only child of said Edmond Grant and Sallie Grant; Nancy K. Vinson died before her mother, Sallie Grant, and about the year 1879, leaving her surviving three children, to wit, Thomas E. Vinson, Sarah E. Vinson (now Sarah E. Gardner), and John A. Vinson, all of whom are more than 21 years of age, are married and have children; Ben Vinson, the husband of Nancy K. Vinson, died about 11 years ago.

"In 1905 Thomas E. Vinson, the plaintiff in this action, acquired the interest of his sister, said Sarah E. Gardner, née Vinson, in the lands passing under this will by deed, which is of record in the office of the register of deeds for said Wayne County in Book 89, page 103.

"During the same year, 1905, the said Thomas E. Vinson and his brother, John A. Vinson, claiming then to be the sole owner of said lands, divided the same between them, both being then of full age, by executing deeds to each other, 79 acres being conveyed by said Thomas E. Vinson to John A. Vinson, and 108 acres being conveyed by said John A. Vinson to Thomas E. Vinson, by deeds dated .... October, 1905, and registered in Book 89, pages 403 and 404, respectively, and the respective grantees in said deeds have since been in possession of the respective portions of said lands. It is the 108 acres held by the said Thomas E. Vinson which he has contracted to convey to the defendant as above set forth."

Upon this statement we concur in the ruling of his Honor below that the title offered is a good one, and defendant must comply with his contract of purchase. The first takers of a life estate in the property, to wit, Sallie Grant and Daniel Grant, having died, the estate in question will properly depend on the latter part of the clause and the pertinent facts in reference thereto. "I loan to my daughter, Nancy K. Vinson, the real estate during her life, and to the lawful heirs of her body, and if they should all die leaving no heirs, then the real estate shall return to the Grant family." It will be noted that in the former part of this devise, the estate being to Nancy Vinson for life and the heirs of her body, an estate in fee tail is conferred upon Nancy Vinson, converted by our statute into a fee simple, and in our opinion by the latter portion

no estate in the property is conveyed directly to the heirs of Nancy, but they are only referred to in determining the event by which the estate given to Nancy shall become absolute, or shall return to the Grant family. *Hobgood v. Hobgood,* 169 N. C., 485-489. In other words, the entire devise by correct interpretation gives to Nancy a fee-simple estate, defeasible on her death without heirs of her body or lineal descendants. *Smith v. Lumber Co.,* 155 N. C., 389; *Rees v. Williams,* 164 N. C., 128; *Whitfield v. Garris,* 134 N. C., 24.

Under the former law the limitation over to "the Grant family" would be considered too remote and void under the rule against perpetuities. It was chiefly to prevent this that the Legislature passed the act of 1917, C. S., 1737, which provides: "That every contingent limitation in any deed or will made to depend upon a dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children or offspring or descendant or other relative, shall be held and interpreted a limitation to take effect when such person dies not having such heir or issue or child or offspring or descendant or other relative living at the time of his death or within ten lunar months thereafter, unless the intention of such limitation be otherwise expressly and plainly declared on the face of the deed or will creating it."

Speaking to the effect of this statute in *Bell v. Keesler,* 175 N. C., at page 525, the Court said: "It was enacted for the primary purpose of making such ulterior limitations good by fixing a definite time when the estate of the first taker shall become absolute, and it is also held to establish a rule of interpretation by which the estate of the first taker shall be affected with the contingency till the time of his death unless a contrary intent clearly and plainly appears on the face of the instrument."

Under a proper application of these principles the estate of Nancy K. Vinson became absolute on her death leaving three living children, her descendants and heirs at law, and plaintiff having acquired by descent from her and by deeds from the other heirs, the interest bargained for in this contract can convey a good title, entirely freed from the ulterior and contingent limitation to the Grant family contained in the will. *Patterson v. McCormick,* 177 N. C., 448.

There is no error, and the judgment will be

Affirmed.

D. C. LAWRENCE v. A. C. BECK AND P. B. BECK, HIS WIFE.

(Filed 28 March, 1923.)

1. Mortgages—Foreclosure—Sales—Statutes—Clerks of Court.

The clerk of the court acquires supervisory power of the sale of land under power contained in a mortgage or deed of trust from the time of an advanced bid paid into his hands, under the provisions of C. S., 2591, which continues until after the final sale under foreclosure.

2. Same.

The supervisory powers invested in the clerk of the court over sales under mortgage, deed of trust, etc., are not those of general control as exercised by the courts in case of an ordinary judicial sale, but confined by the statute to sales, and resales under the power of sale contained in the instruments, and in accordance with the directions of the statute. C. S., 2591.

3. Same—Ministerial Duties—Nunc Pro Tunc.

While under the provisions of C. S., 2591, it is required that the clerk order title to be conveyed to the purchaser at the final resale, *semble*, this order is merely ministerial when the resale has been made in accordance with the statute in other respects, and the omission may be supplied by the clerk making the order *nunc pro tunc*, and the deed accordingly made will convey the title to the purchaser.

4. Judgments—Conclusions of Law—Matter of Right.

A judgment is the conclusion of law upon the facts admitted or authoritatively established in the course of a properly constituted suit; and where the ultimate facts have been so ascertained, a correct judgment must follow and be entered thereon as of right.

5. Mortgages—Foreclosure—Sales—Contracts—Agreement of Parties—Clerks of Court—Statutes.

Where the mortgagor of land is in possession and has placed substantial improvements thereon, and is unable to meet some of the notes he has given to the mortgagee for the balance of the purchase price of the land, he may make a valid and enforceable compromise agreement with the mortgagee that the latter will cancel the outstanding notes, and the former will surrender immediate possession and lose the value of the improvements he has placed on the land; and where, in pursuance of this agreement, the mortgagor has proceeded to foreclose under the power of sale for the purpose of shutting off the right of redemption by the mortgagor and his successors in title, and thereafter the mortgagee, as final purchaser, has brought his action for possession, and his title is found to be incomplete for the failure of the clerk to order conveyance to him, C. S., 2591, it will not warrant a judgment, ignoring this agreement and permitting the plaintiff to proceed with his foreclosure without prejudice.

6. Same—Judgments.

Held, under the facts established by the verdict in this case, judgment will be entered that the clerk order the conveyance to the purchaser *nunc pro tunc;* that plaintiff surrender for cancellation the remaining purchase money or mortgage notes of the defendant, with interest thereon;

that defendant's right of redemption and all interest in the lands in defendant or their successors be forever barred and foreclosed; that plaintiff is entitled to the present possession of the land, and that a writ issue to that end; that plaintiff recover the ascertained rents and profits of the land during defendant's wrongful possession, with costs taxed equally against the parties.

APPEAL by plaintiff from *Daniels, J.*, and a jury, at September Term, 1922, of LEE.

Civil action to recover possession of a house and tract of land under claim of ownership by reason of a purchase at foreclosure sale, and for judgment for deficiency in purchase price.

There were facts in evidence on part of plaintiff tending to show that on 1 September, 1920, plaintiff sold and conveyed to defendants the house and land in controversy for $5,600, to be paid at the rates of $100 per month, with accrued interest, notes being given for these amounts respectively, and at said date the grantees executed a deed of trust to D. B. Teague to secure payment of said notes with power of sale on default, said instrument containing provision that the entire debt would mature on failure of payment of any installment of purchase price and interest thereon, or any part of same. That defendant met the payments as per contract till 1 March, 1921, and default being thereafter made, the trustee, at plaintiff's instance, sold said land after due advertisement, when one C. A. Godfrey became the last and highest bidder, at $4,525. That within ten days, an increase having been made and paid to the clerk by one D. L. St. Clair, a resale was ordered under C. S., 2591, and at said second sale the property was bid off by one P. L. Johnston at $4,775, and that bid having been duly assigned to plaintiff, the trustee conveyed the property to said plaintiff, and after crediting the purchase money notes with amount of bid, there was a balance due plaintiff of $437.20.

There was further evidence to the effect that defendant has been in the continuous possession of the property and refuses to surrender same to plaintiff, and on these, the principal allegations of the complaint, with supporting evidence, plaintiff seeks to recover possession of the property and balance due on the purchase money.

Defendant denied that there had been any regular or valid foreclosure of the deed of trust, and offered evidence tending to show that no report of the second sale had ever been made to the clerk of the Superior Court, and no order entered by him that the trustee make the deed to plaintiff under which he claims title.

Defendant alleged further, and offered evidence tending to show, that on or after 1 March, 1921, the time of the alleged default, defendant having paid $500 of the purchase price with maturing interest, and

having made permanent improvements on the property to the amount of $1,200, plaintiff and defendants came to an agreement to cancel the trade under conditions as then presented, plaintiff to surrender the unpaid purchase-money notes, amounting to $5,100, and defendant to give up the property, losing thereby the $500 already paid and the improvements put upon the place. That plaintiff being advised by counsel that in order to bar defendants of any further claim or equity in the property, it was advisable and perhaps necessary that a foreclosure be had, defendant agreed to make no objection or resistance thereto, and plaintiff could take such steps as were required to assure his title. That defendant was ready and willing to carry out his part of the agreement above set forth, and had moved a part of his property from the place when ascertaining that plaintiff would not surrender the purchase-money notes, and was to insist on a deficiency judgment, defendant refused to vacate the property, and has since been in possession of the same. On these, the opposing positions and evidence of the parties, the cause was submitted to the jury, and verdict rendered by them as follows:

"1. Was the deed of trust foreclosed as provided by law? Answer: 'No.'

"2. Is the plaintiff the owner and entitled to possession of the lands described in the complaint? Answer: 'No.'

"3. What is the monthly rental value of said land? Answer: '$30 per month.'

"4. Did plaintiff agree to cancel and surrender the notes of defendants' as alleged? Answer: 'Yes.'"

Judgment was entered that defendants go without day without prejudice to plaintiff's right of foreclosure as provided by law and the contract of the parties. Plaintiff excepted and appealed.

Seawell & Pittman and Teague & Teague for plaintiff.
Gavin & Jackson and Hoyle & Hoyle for defendant.

HOKE, J. In C. S., 2591, provision is made for increase of bids and resale of property where there has been a foreclosure under a power of sale contained in a mortgage, deed of trust, etc., and in case of sales by executors, administrators, or others under a power conferred by a will. In the case of *In re Sermon's Land,* 182 N. C., 122, the Court, in referring to the statute, held that the powers of supervision and control conferred upon the clerks of the Superior Court did not arise in such cases unless and until there had been the advanced bid specified in the statute paid into the hands of said clerk. In the present case it appears that the advance bid was duly made, the amount paid to the clerk, and a resale ordered. On these facts the statute confers upon the clerk a

certain measure of supervision and control over the matter, and clearly contemplates and provides that where this right of supervision has attached, and a resale has been ordered, it is required to a complete and regular foreclosure that a report of such resale shall be made to the clerk, the question shall again remain open for another ten days for further increased bids, and on a final sale, the clerk shall enter an order that the mortgagee, trustee, or other shall make title to the purchaser. This sufficiently appears from the various provisions of the section as follows:

"That the clerk shall not only be paid the amount of the increased bid, but if there is any doubt of the solvency and promptness of the bidder, a bond may be required in security of the bid."

"Resales may be had as often as the bid may be raised in compliance with the section."

"Upon the final sale, the clerk shall have power to order that title be made to the purchaser, he may make such orders as may be just and necessary to safeguard the rights of the parties, and he shall keep a record which will show in detail the amount of each bid, the purchase price, and the final settlement, etc., etc."

And the recent case of *Pringle v. Loan Assn.,* 182 N. C., 316, gives decided intimation that this is the proper interpretation and effect of the statutory provision.

We think, therefore, his Honor correctly ruled that for want of a report to the clerk of the last sale, and an order by that officer to the trustee to make title, there has not been a regular and completed foreclosure, and these facts having been found by the jury, the first issue was properly answered against the plaintiff.

There is doubt, however, of the correctness of the second ruling of his Honor that in case the first issue should be answered "No," they should also answer the second issue "No." From a perusal of the statute and the decisions apposite, *In re Sermons, supra,* and *Pringle v. Loan Assn., supra,* it will appear that even after the right of supervision has arisen to the clerk by virtue of an increased bid, that officer's powers in the premises are not those of general control, as in case of an ordinary judicial sale. As said in *Sermon's case, supra,* the stipulations of the mortgage, etc., and the contract rights of the parties, are not to be interfered with except and to the extent that the statute expressly provides. The clerk's powers are only to see that on an increased bid, and as often as they are made, a resale shall be had, and on final sale a deed shall be made to the purchaser, and he may make such orders as may be just and necessary to that end, and where it appears, as in this case, that there was no further increase of the bid, and without orders of the clerk the parties have of their own motion proceeded to do the only thing the clerk could have ordered, as now advised, we see no reason why, so far as the second issue is concerned, this merely ministerial duty of the clerk

should not have been presently performed and supplied by action *nunc pro tunc*, and the plaintiff allowed a verdict on the issue as on a perfected claim.

On the record, we find it unnecessary to make definite decision on this question, for the verdict on the second issue is not found as a distinct and substantive fact, but only as a conclusion of law from his Honor's ruling and the finding of the jury on the first issue, and, regardless of the verdict on these two first issues, we are of opinion that the verdict on the third and fourth issues establishes facts which permit and require that the court make final disposition of the rights of the parties involved in the controversy.

In this jurisdiction, and others basing their system of jurisprudence on common-law principles, a judgment is but the conclusion that the law makes upon the facts admitted or authoritatively established in the course of a properly constituted suit, and where in such a proceedings the ultimate facts have been so ascertained and declared, the correct judgment must follow and be entered thereon as of right. *Beard v. Hall*, 79 N. C., 506; *Barnard v. Etheridge*, 15 N. C., 295; 23 Cyc., p. 665.

In *Beard's case, supra*, the principle adverted to is stated as follows: "A judgment is the legal conclusion upon facts found or admitted by the parties in the course of the action to which the party is entitled as a matter of course as soon as the facts are so established. This is the rule of the common law, and we have found no statute enacting otherwise," citing 2 Tidd's Practice, p. 932; 2d Daniels' Chancery, par. 1017; *Davies v. Davies*, 9 Vesey, p. 46; *Campbell v. Mesier*, 4 Johnston, p. 341.

Referring to the pertinent issues in view of these principles, and interpreting the same in reference to the pleadings, the evidence and the charge of the court, the appropriate and approved method with us, *Reynolds v. Express Co.*, 172 N. C., 487, the finding on the fourth issue determines that on or not long after 1 March, 1921, the parties mutually agreed to cancel the trade, plaintiff to surrender the remainder of the unpaid notes to the amount of $5,100, and all interest thereon, the property was to be returned to plaintiff, and possession surrendered, defendant thus losing the amount paid and all of the improvements. And further, that the foreclosure was merely in assurance of the title to plaintiff by shutting off any and all right of redemption in defendants or their successors in interest.

True, the exact time of the surrender of possession is not fixed by the verdict, but the evidence of the defendant is to the effect that the cancellation was to go into effect not long after 1 March, 1921, and the evidence of plaintiff fixes the time for surrender of possession to plaintiff on 1 September, 1921. There is practically no substantial conflict between the parties on the issue of cancellation, the evidence showing that after

they had entered on performance, the surrender of possession was interrupted by some nonessential occurrence, indicating that the parties, one or both of them, were in a sensitive mood and easy to take offense, but nothing occurred to justify a destruction or modification of the agreement to cancel.

Under the authorities, and in the absence of fraud and imposition, there was no reason why the parties could not make such an agreement. *Jones v. Pullen,* 115 N. C., 465; *McLeod v. Bullard,* 86 N. C., 210. And the jury having further found in response to the third issue that the fair rental of the land is $30 per month, and it further appearing that plaintiff is in present possession and control of the notes, we are of opinion that it is the conclusion of the law on the facts presented and established that plaintiff surrender for cancellation the remaining purchase-money notes and all interest thereon; that the right of redemption and any and all interest in the land in defendants or their successors be forever barred and foreclosed; that plaintiff is entitled to present possession of the property and writ issue to that end; that plaintiff have and recover of defendant and the sureties in any bond he may have given for the purpose the damages for adverse and wrongful occupation at the rate of $30 per month from 1 September, 1921, till possession be delivered to plaintiff. That the cost be taxed and adjudged the one-half against plaintiff and one-half against defendant, and that judgment be entered accordingly.

This will be certified that the judgment heretofore rendered be set aside and a new judgment entered in accord with this opinion.

Reversed.

NORFOLK SOUTHERN RAILROAD COMPANY v. J. W. McARTAN, SHERIFF, AND THE BOARD OF COMMISSIONERS FOR THE COUNTY OF HARNETT.

(Filed 28 March, 1923.)

1. Highway—Bridges.

The word "highways" includes within its meaning bridges thereon intended and used as public thoroughfares.

2. Same—Counties—Contracts—State Highway Commission—Statutes.

It is primarily required that a county construct and repair its bridges; and where the board of county commissioners has, with statutory authority, contracted with the State Highway Commission to build a bridge on its public road to be taken over in the State's system of highways, it is the duty of the board of county commissioners to provide the funds necessary for the purpose in the manner provided by law.

3. Same—Taxation—Debt—Constitutional Law.

The authority conferred by C. S., 3767-3772, upon the board of county commissioners to build, repair, or alter its road and bridges in any way that may seem practicable, and issue bonds or borrow money and issue notes not to exceed actual cost, and to levy sufficient tax on real and personal property to pay interest, and create a sinking fund, is not necessarily inconsistent with the amendment to Article V, section 6, of our State Constitution, excepting from the limitation of 15 cents on the $100 valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general act," the amendment only adding that the approval may be done by "general act."

4. Same—Legislative Authority.

Where, with special legislative authority, a board of county commissioners has contracted with the State Highway Commission to build a bridge on a public highway of the county, to be absorbed in the State's system of highways, and for the building of the bridge the county has incurred an indebtedness for which it has afterwards given its notes, exception to taxation levied to meet these notes upon the ground that it required a special act of the Legislature to give them validity is untenable when proceedings for the purpose have been had under the provisions of the general statutes. C. S., 3767-3772.

5. Constitutional Law—Amendments—Reënacting Clause—Repeal.

The rule under which a new constitution is construed to supersede a prior constitution does not apply to an amendment which reënacts the former provisions with superadded powers, as in this case, the powers conferred upon the county commissioners to provide for the bridges on its highways, superadding the words that the approval of the Legislature may be by special or general statute. C. S., 3767-3772.

6. Highways—Bridges—Counties—State Highway Commission—Taxation—Debt.

The board of commissioners of a county contracted with the State Highway Commission, with legislative authority, to construct a bridge upon a highway to be included in the State's system of highways, and having incurred this obligation thereafter issued its notes therefor and the plaintiffs seek to enjoin a tax levied to pay these notes: *Held*, plaintiffs' position that it was unnecessary to create a sinking fund, as the State Highway Commission would repay the expenditure for the bridges, is untenable, and that it was incumbent upon the county commissioners to levy the tax to provide for the payment of the notes, principal, and interest, though executed after the obligation under the contract had been incurred.

APPEAL by plaintiff from *Daniels, J.*, at chambers, 30 December, 1922, from HARNETT.

Application for an injunction to restrain the collection of a tax for building bridges. For the year 1921, the commissioners of Harnett levied the following taxes on property of the value of $100: For schools, 50 cents; for general county purposes, 13 cents; for bonds, 2 cents; and

for bridges, 5 cents. The plaintiff brought suit to enjoin the collection of the tax for bridges on the ground that it conflicts with Article V, section 6, of the Constitution. The plaintiff's motion to continue a temporary restraining order was heard by Daniels, J., at chambers, on 30 December, 1922, and denied. The plaintiff appealed.

R. N. Simms and Marshall T. Spears for plaintiff.
Charles Ross for defendant.

ADAMS, J. On 20 May, 1921, the board of commissioners entered into a written contract with the State Highway Commission in accordance with the provisions of Public Laws of 1921, ch. 2, sec. 14, for the construction of the Lafayette Highway through Harnett County. Finding that it was necessary to borrow $100,000 to be applied in the construction of the road and the necessary bridges, the commissioners, on 24 May, authorized their chairman to issue for this purpose in the name of the county four notes of $25,000 each. These notes were supplemented by others issued for the same purpose, and when the taxes were levied for 1921, there were valid outstanding obligations of the county in a large amount in addition to the indebtedness contracted for the construction of the highway. The commissioners levied a tax which was sufficient in their opinion to retire at maturity the notes issued for borrowed money; and after the tax list was placed in the hands of the sheriff for collection, the plaintiff applied for and obtained the restraining order, which was afterwards vacated.

The plaintiff's cause of action rests on the contention that the total of the taxes is in excess of the constitutional limitation and that the tax assessed for the construction and improvement of bridges is invalid and unenforceable, and hence should not have been included in the levy. Article V, section 6, of the Constitution is as follows: "The total of the State and county tax on property shall not exceed fifteen cents on the one hundred dollars value of property, except when the county property tax is levied for a special purpose, and with the special approval of the General Assembly, which may be done by special or general act: *Provided,* this limitation shall not apply to taxes levied for the maintenance of the public schools of the State for the term required by Article IX, section 3, of the Constitution: *Provided further,* the State tax shall not exceed five cents on the one hundred dollars value of property."

The sum of the taxes imposed for bridges and for general county purposes exceeds fifteen cents, and the tax of five cents for bridges may be regarded as unauthorized unless embraced in the exception set out in the foregoing section. The defendants insist that this tax was levied on county property for a special purpose and with the special approval of

the General Assembly, and is, therefore, within the exception. The section of the Constitution hereinbefore cited originally provided that the taxes levied for county purposes should never exceed the double of the State tax, except for a special purpose, and with the special approval of the Legislature; but, as amended, it provides that the special purpose for which the tax is levied and the special approval of the General Assembly may be manifested by a special or general act.

We do not understand the plaintiff as denying that so much of the tax as was levied for the construction and repair of bridges was a tax assessed for a special purpose (*Brodnax v. Groom*, 64 N. C., 248), but as contending, among other things, that it was invalid because imposed without the special approval of the General Assembly. As we construe the pleadings, it is admitted by the parties that under the provisions of Public-Local Laws of 1913, ch. 427, the roads of the county were generally to be constructed and maintained by the several townships, and that the tax authorized by section 10 of this act was to be applied partly in payment of the cost of maintenance, partly in payment of the interest on the township bonds, and partly in the creation of a sinking fund sufficient in amount to retire the bonds as they respectively matured. For 1921 a tax was levied in each of the townships for road purposes, but neither party contends that the act of 1913 authorized the levy which is complained of in this action. But, in addition to the contention stated above, the plaintiff insists that the road commissioners appointed under this act constituted a road-governing body for each township; that the Lafayette Highway, as soon as it became a part of the State system of roads, was taken out of the supervision both of the road commissioners and of the board of county commissioners; and that it was no longer incumbent upon the townships or the county to construct or maintain thereon either culverts or bridges. However cogent this argument may be with respect to the township road commissioners, we are convinced that it is not applicable to the board of county commissioners. Primarily, a county is required to construct and repair its bridges (C. S., 1297, sec. 22); and as the board of commissioners under authority specially conferred (Public Laws of 1921, ch. 2, sec. 4), made a contract with the Highway Commission by the terms of which the county was to construct the Lafayette Highway, extending from the Wake to the Cumberland line, it was the duty of the board, if legally authorized, to provide the funds requisite for such purpose. The contract, it may be noted, embraced the construction of the necessary bridges, for the word "highway" includes bridges intended and used as thoroughfares. *Comrs. of Dodge County v. Chandler*, 96 U. S., 205; *Washer v. Bullitt County*, 110 U. S., 558.

In order to provide funds with which to build the road and bridges forming a part of the Lafayette Highway, there being no act applicable exclusively to Harnett County, the board, in issuing the notes above referred to, proceeded under C. S., 3767-3772, and the question is whether the tax complained of was authorized by these statutes. They provide in substance that whenever it shall be necessary to do so, the board of commissioners may build, repair, or alter any of the roads and bridges in the county in any way that may seem practicable, and for the purpose of raising funds with which to pay the cost, may issue bonds or borrow money and issue notes to an amount not to exceed the actual cost of such roads or bridges, and may levy upon all real and personal property in the county a tax sufficient to pay the interest on the bonds or notes, and to create a sinking fund to provide for their payment at maturity.

The plaintiff contends, first, that the board of commissioners was not authorized by these statutes either to issue the notes or to levy the tax, and, in the next place, that the board, even if authorized to do so, failed to comply with the statutory provisions. If these propositions can be maintained, the restraining order was improperly vacated.

With regard to the first objection, the plaintiff's argument is this: The sections referred to were in force prior to the amendment of Article V, section 6, of the Constitution, and when they were enacted a special act was required for the levy of a tax beyond the prescribed limit; and, moreover, it was not the intention of the General Assembly to confer authority by sections general in their application to levy a tax in excess of the constitutional limit.

In considering this argument it is expedient to keep in mind the change made by the constitutional amendment—more particularly the clause, "which may be done by any special or general act." With respect to the exception, this clause differentiates the amended section from the original. While it is true that a new constitution generally supersedes a prior constitution, it will be observed that the amended section, instead of repealing the former requirement as to the "special purpose" and the "special approval of the General Assembly," reënacts it with the superadded provision. The clause may be prospective as to the tax to be levied, but we discover no indication of an intent to repeal sections 3767-3772; and not having been expressly or impliedly repealed by the constitutional amendment, they remain in full force and effect. For these reasons the tax, which was levied after the Constitution was amended, was assessed for a special purpose, and with the special approval of the General Assembly expressed in a general act. *Calhoun County v. Galbraith*, 99 U. S., 214; *Knox County v. Christianer*, 68 Ill., 453; *Alleghany County v. Gibson*, 90 Pa., 397; *Douglass v. Harrisville*, 9 W. Va., 162; *Rogers v. Windoes*, 48 Mich., 628; *State v. Lynch*,

88 Ohio, 71; 6 R. C. L., 34. See, also, *Pegram v. Cleveland County*, 64 N. C., 557.

But, granting that sections 3767-3772 conferred authority upon the board to levy a tax for roads and bridges, the plaintiff further contends, as suggested, that these sections were not complied with; that the total cost of the bridges on the highway was $59,116.06, on which the annual interest was about $3,600; that as the county was to be reimbursed by the Highway Commission, it was not necessary to create a sinking fund in accordance with section 3769; and, furthermore, that when the tax was levied no notes had been issued for the construction of bridges. The plaintiff argues that in view of these circumstances the commissioners disregarded the provisions of the statutes under which they proceeded.

It should be specially noted that the contract with the Highway Commission was made on 20 May, and that the resolutions authorizing the issuance and execution of the notes for building the highway and bridges were adopted on 24 May and 11 July respectively. They were matters of record for weeks before the tax was levied.

Under these circumstances, we think it was incumbent upon the board of commissioners when they levied the tax to make provision for paying the full amount incurred by their obligations, principal and interest, although at that time notes which were to be issued in pursuance of the contract had not in fact been executed and delivered.

We find no error in the record, and the judgment vacating the restraining order is

Affirmed.

F. WADE CURRIE AND WIFE v. WILEY B. MALLOY AND WIFE.

(Filed 28 March, 1923.)

1. Pleadings—Amendments—Peremptory Order for Trial—Appeal and Error—Objections and Exceptions.

An exception to an order of the Superior Court allowing an amendment to the complaint and setting the case for trial peremptorily on a certain day of a subsequent term, specifying the amendment only, confines the exception to the order allowing the amendment, and no exception being taken to that part of the order setting the case peremptorily for trial, there is nothing in that respect upon which an assignment of error may be based.

2. Same—Court's Discretion.

Under the liberal policy of our procedure in allowing amendments to pleadings, it is within the discretionary power of the trial court to permit the plaintiff to amend his complaint by alleging fraud and deceit, when the same is germane to the original inquiry and does not substantially change the cause of action alleged. *Semble*, when the defendant shows

to the court that such amendment allowed upon the trial has taken him by surprise, and finds him unprepared, the court may withdraw a juror, order a mistrial, and continue the case.

3. Deeds and Conveyances—Title—Minors—Intent—Evidence.

Where the question of the interest of minors in the title to lands is involved in a suit to recover damages for defendants' fraud and deceit in misrepresenting that the fee-simple title was in himself, it is competent for the minor to testify that she had deposited her check with the clerk of the court to redeem her interest, as a fact accomplished; and error, if any, committed by the court in having previously permitted her to testify as to her future intention to sue to recover such interest is rendered harmless.

4. Fraud—Deceit—Evidence—Lis Pendens—Actions.

In an action to recover damages for the defendant's fraud and deceit in inducing the plaintiff to convey his title to his lands in exchange for the defendant's lands when the latter had only title to a part thereof, a suit concerning the matter in dispute, pending in the county, is not effectual as a *lis pendens* against the defendant's positive and unequivocal assertion of title, upon which the plaintiff relied, and which induced him to part with the title to his own lands.

5. Same—Deeds and Conveyances—Written Instruments.

Where the defendant has by deceit and fraud induced the plaintiff to convey his lands in exchange for defendant's land, upon delivery of defendant's deed duly executed, containing full warranty of title, the fraud is in the treaty, and the deed being upon its face in accordance with the representations of the defendant, the principle requiring that one afforded full opportunity to read an instrument will be bound by its terms has no effect upon the plaintiff's right to recover.

6. Appeal and Error—Objections and Exceptions—Instructions—Contentions.

The trial judge, as has often been said and reiterated, should be afforded an opportunity to correct an erroneous statement of the contentions of the parties in his charge to the jury, and an exception thereto after verdict comes too late to be considered on appeal.

7. Appeal and Error — Instructions — Requests for Instructions—New Trials.

Exception that the charge of the court was not sufficiently full upon a phase of the controversy arising upon the pleadings and evidence should be taken to the refusal of the court of appellant's prayer for instruction covering the matter complained of, and where the principles of law involved are sufficiently stated in the general charge, a new trial will not be granted on appeal.

8. Appeal and Error—Instructions—Evidence—Presumptions.

The evidence as recited in the charge of the court will be assumed to be correct on appeal, it being required that the appellant show error.

APPEAL by defendant from *Bond, J.*, and a jury, at October Term, 1922, of CUMBERLAND.

WALKER, J., stating the case: Plaintiffs purchased land described in the complaint from the defendants for $1,000, by deed with usual covenants of seizin, encumbrances, and warranty, and this was admitted by the answer and in the case.

At the time of and before the defendants purchased the land, and at the time they sold to plaintiffs, an action entitled "*Edge v. Edwards*" was pending in the Superior Court of Cumberland County, the place of residence of all parties, wherein defendants' grantors alleged they were the owners of the land by reason of a tax title, and wherein certain minor heirs alleged that they were the owners of said land. Before trial of the present action, defendants made themselves parties to the action of *Edge v. Edwards,* and there was a final judgment that defendants had a good title to only one-fourth interest in said land, and title to another one-fourth interest subject to disaffirmance by one of the said minor heirs, and that defendants had no interest in the other two-fourths interest, which was the property of the two other minor heirs. The defendant Malloy admitted, on his direct examination, that defendants' immediate grantor had told him at the time of the purchase that he, the grantor, had only a tax deed against minor heirs for a portion of the land, and that one of the minor heirs was in an institution for the feeble-minded.

At the time of and before plaintiffs purchased, defendants represented to plaintiffs that they had a perfect title to the lands. And defendant Malloy admitted upon the trial that "before the trade was completed they (plaintiffs) came and asked me about the title, and I told them that the title was all right."

The jury returned the following verdict in response to the issues submitted to them:

"1. Did the defendant sell the lands described in the complaint to the plaintiffs for $1,000? Answer: 'Yes.'

"2. Did the deed of the defendant, referred to in the complaint, fail to convey a good and indefeasible fee-simple title to said land? Answer: 'Yes.'

"3. Was there a compromise of matters in difference between the plaintiffs and defendant, as alleged? Answer: 'No.'

"4. If so, was the alleged compromise obtained by the defendants induced by false and fraudulent statements made to the plaintiffs by the defendants, or either of them, as alleged in the complaint? Answer:

"5. Was the payment of the said $1,000 to the defendants induced by false and fraudulent statements made to the plaintiffs by the defendants, or either of them, as alleged in the complaint? Answer: 'Yes.'

"6. What damages, if any, are the plaintiffs entitled to recover of the defendants? Answer: '$1,000.'"

Judgment was entered on the verdict, and defendants appealed.

Bullard & Stringfield, W. C. Downing, and Henry E. Williams for plaintiffs.

Dye & Clark for defendants.

WALKER, J., delivering the opinion of the Court, after stating the case as above: We will now consider the exceptions in some detail, so as to be sure that we cover fully the grounds of contention as taken by the respective parties.

Exception one is abandoned.

Exceptions one and a half, two, and seven: It appears by the record that defendants excepted to the order allowing amendment and peremptorily setting case for trial only "in so far as the same permits the amendment," therefore, the defendants did not at the time except to the setting of the case for trial at the next term, but in effect if not in form, only excepted to the amendment of the complaint. Had they excepted to the setting of the case for trial at the next term, the judge would have had an opportunity to pass upon the exception, and would have, if he found proper, set the case at a subsequent term, but by his failure to except at the proper time there is nothing for review under this exception. The assignment of error in the case on appeal cannot cure the failure to except at the time, because assignments of error must be founded upon exceptions properly and duly taken. *Borden v. Power Co.,* 174 N. C., 73; *Harrison v. Dill,* 169 N. C., 544; *S. v. Tyson,* 133 N. C., 699; *S. v. Davenport,* 156 N. C., 611.

Exception two: This exception is also untenable. It is said, speaking to the exact point, in *Dockery v. Fairbanks,* 172 N. C., 529: "The only question presented is as to the authority of the trial judge to permit an amendment alleging fraud in an action for damages for false representation and breach of warranty in the original sale. The defendant was in court, and the amendment alleging the fraud was germane to the original complaint, and it was in the discretion of the trial judge to permit the amendment of the complaint to be filed. If this had been done during the trial, and the nature of the amendment was such that the defendant would have been taken by surprise, not being prepared to meet the charge of fraud, then, perhaps, it might have been error not to withdraw a juror and grant the defendants a continuance; but this was not done by defendants. The Code favors a liberal allowance of amendments, in order that cases may be tried on their merits. There could have been no advantage in dismissing the plaintiffs' action and requiring

him to bring a new action setting up what is now alleged in the amended complaint. That would have been violating, at least, the spirit of The Code and our procedure. The court, in its sound discretion, could allow the amendment, which was simply an additional ground to that alleged in the original complaint, or rather an enlargement, or amplification of the cause of action already stated, and not the setting up of a new cause of action. *Joyner v. Early,* 139 N. C., 49; *Worth v. Trust Co.,* 151 N. C., 196; *Pritchard v. R. R.,* 166 N. C., 535; 31 Cyc., 409, 411. A liberal construction of pleadings and the granting of amendments to perfect the pleadings and base the cause upon its merits is favored by our present system of pleadings and practice. *Blackmore v. Winders,* 144 N. C., 215; *Brewer v. Wynne,* 154 N. C., 467.

Exception seven: It appearing that defendants did not except to the order peremptorily setting the case for trial at October term, and it further appearing that the amendment, to which exception was taken, was allowed in accordance with the statute and our decisions, this exception must fail.

Exceptions three and four: The witness (Sudie Belle Grantham, who was Sudie Belle Edwards, and one of the minors) was permitted to testify that when she became twenty-one years of age she intended to sue to recover her interest in this land. While it may not have been competent for the witness to testify what she intended to do, it was competent for her to state, as she did afterwards, that she had deposited with the clerk a check to redeem her interest in the land, because this was a fact accomplished and was not merely an expression of her intention as to what she would do in the future. The deposit of the check was an equivocal act indicating clearly her intention to redeem the land, or her interest in it, and thereby to disaffirm her deed, and this makes the expression of her intention "as to what she would do in the future," while on the witness stand, but harmless error, even if it was not competent. We have generally held that error in admitting testimony is harmless, and not sufficient to reverse the judgment of a court below, unless it appears to have been prejudicial to the party complaining. *Southall v. Shields,* 81 N. C., 28; *Freeman v. Brown,* 151 N. C., 111.

Exceptions five and six: Exception five is abandoned in defendants' brief. Exception six, that the court erred in not allowing defendants' motion for judgment as of nonsuit at the close of all the evidence, is equally untenable. There was evidence supporting plaintiffs' cause of action, hence the nonsuit could not have been allowed.

The defendants admitted the sale of the land to the plaintiffs for $1,000 in the answer.

Mary S. Currie testified: "Malloy said he was a real estate dealer. That he would sell us the place for $1,000, and make everything all

right; would make us a good deed, and that he had a perfect title. The lot has a three-room house on it, and Mr. Malloy agreed to put on a front porch, a back porch, and another room. He did none of these things. Some time before the trade was closed, I came to Fayetteville to see Mr. Malloy. We were living on the place then, though we had not bought it, as I was told by a neighbor that Mr. Malloy had no title to it. When I came to see him (Malloy) he said the title was good, and he said he and his wife would give me a warranty deed, and insisted that the title was good."

F. Wade Currie, plaintiff, testified: "Mr. Malloy told us he had a nice place containing about 10 acres with two acres cleared, and that he could give a perfect title to it. I relied on his statements from the first. We went to his office and told him that we heard the title was not good, and he told us to go right ahead, that the title was all right, and that he and his wife would make us a warranty deed. He said that we could rest assured and pointed to another man sitting in his office and said he sold him his land and some of the neighbors told him the title was not good, because they wanted the land themselves, and that the title was good."

The defendant W. B. Malloy testified: "Before the trade was completed, they came and asked me about the title, and I told them that the title was all right, and that my wife and I would execute a warranty deed, and that if the title was not all right, we would make it all right. That Mr. Cooper told me, when I bought the land from him, that he had only a tax deed against minor heirs for a portion of the land; he told me that he understood that one of the minor heirs was in Kinston, N. C., in an institution for the feeble-minded."

See stipulations at end of transcript, record, page 52, which are as follows:

In this case it is agreed by Dye & Clark, attorneys for the defendants, and Henry E. Williams and W. C. Downing, attorneys for the plaintiffs, that defendant's statement of case on appeal as served upon the attorneys for the defendants by the attorneys for the plaintiffs be amended as follows:

1. The interlineations made therein with pen and ink shall be and constitute a part of said statement.

2. To the cross-examination of W. B. Malloy shall be added the following, to wit: The South Carolina property has been sold under mortgage; the deed which I executed to Mr. and Mrs. Currie for the land in Cumberland County was held for them by J. O. Talley, attorney, until the time of the alleged compromise; it was then deposited in the LaFayette Bank and Trust Company with the other papers; I went there and got it after the thirty days were out; it has never been recorded; the

Curries have no deed for the Cumberland County land; Mr. Cooper told me when I bought the land from him that he only had a tax deed against minor heirs for a portion of land; and further told me that he understood that one of the minor heirs was in Kinston, N. C., in an institution for the feeble-minded.

And to the direct examination of H. E. Williams shall be added the following, to wit: The alleged compromise of Mr. Malloy was based on the condition that Mr. and Mrs. Currie could get their South Carolina property back with the payments standing just as they were when they first started with Malloy; the compromise failed because Malloy had changed the payments on the South Carolina property, and Mr. Huntley had elected to declare all the indebtedness due.

3. That the summons herein was issued on 21 October, 1921, returnable on 1 November, 1921, and was served on the defendants on 22 October, 1921, and is regular in all respects; and this memorandum may be inserted in the case on appeal in lieu of said summons.

4. That the defendants' statement of case on appeal (so amended) shall be and constitute the case on appeal in this cause.

Mr. Cooper testified: "I told Malloy that I had a tax deed for this land, and that I bought the property from Mr. Page. I also told him that I bought the interest of Neill and Sudie Bell Edwards, and that there were two more Edwards heirs whose interest it would be necessary to purchase to complete the title. I told Malloy that my title was based on a tax deed, and that the property belonged to minor heirs at the time it was sold for taxes. I told him one of the Edwards heirs was living at Kinston, and that I thought the property was subject to be redeemed by the minors."

Plaintiffs introduced summons, complaint, answer, and judgment in *Edge and Malloy v. Edwards*, to which action defendants Malloy were parties, and which action was pending long before the sale to plaintiffs, and the final judgment decreed that defendants had a good title to one-fourth interest only, and an imperfect title to another one-fourth interest, subject to disaffirmance by an infant, and no title to remaining two-fourths interest.

The plaintiffs in this case contend that from the foregoing facts it appears that defendants purchased *pendente lite*, and knew, or are presumed to have known, the true state of the title as set out in the pleadings and the judgment, showing that they had a very imperfect title; that defendants admit that their grantor, at the time of their purchase, told them they were getting only a one-fourth interest absolutely, and another one-fourth interest subject to disaffirmance by an infant; that defendants further admit the sale to plaintiffs for $1,000; and that they represented to plaintiffs that they had a perfect title, and that plaintiffs would

also be protected by the warranty. This, then, fixes defendants with knowledge of their very defective title, yet they admit representing to plaintiffs that they had a perfect title.

It is said in Pollock on Torts, 293: "It seems plausible at first sight to contend that a man who does not use obvious means of verifying the representations made to him does not deserve to be compensated for any loss he may incur by relying on them without inquiry. But the ground of this kind of redress is not the merit of the plaintiff, but the demerit of the defendant, and it is now settled law that one who chooses to make positive assertions without warranty shall not excuse himself by saying that the other party need not have relied upon them. He must show that his representation was not in fact relied upon. In short, nothing will excuse a culpable misrepresentation short of proof that it was not relied upon, either because the other (party) knew the truth, or because he relied wholly on his own investigation, or because the alleged fact did not influence his action at all. And the burden of proof is on the person who has been proved guilty of material (or fraudulent) misrepresentation." See, also, *Griffin v. Lumber Co.*, 140 N. C., 514; *Walsh v. Hall*, 66 N. C., 233; *McArthur v. Johnson*, 61 N. C., 317; *Medlin v. Buford*, 115 N. C., 269.

The Court, in the familiar and much cited case of *Pasley v. Freeman*, 3 Term. Rep. (2 Smith's Leading Cases, 1300), settled the principle that a false affirmation made by the defendant with intent to deceive and defraud the plaintiff, whereby the plaintiff receives damages, is the ground of an action upon the case in the nature of deceit. In such an action it is not necessary that the defendant should be benefited by the deceit, or that he should collude with the person who is. And *Kent, C. J.*, in *Upton v. Vail*, 6 Johns., 181, after expressing his approval of the doctrine announced in *Pasley v. Freeman, supra*, said: "The case went not upon any new ground, but upon the application of a principle of natural justice, long recognized in the law, that fraud and deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence." It has been the accepted law in American jurisdiction, and was discussed and adopted by this Court in an opinion once characterized as containing a "mine of learning," and delivered by *Judge Battle*, in *March v. Wilson*, 44 N. C., 144. After an exhaustive review of the English and American cases, the learned justice concludes: "The principle upon which they were decided is that where there was fraud by the defendant, either in word or deed, resulting in damage to the plaintiff, he might sustain an action on the case for such damage."

Whatever doubt may have existed in regard to the right to maintain an action for deceit in contracts for the sale of land respecting acreage,

title, etc., is removed by the decision in *Walsh v. Hall*, 66 N. C., 233. *Dick, J.*, after noting the general rule of *caveat emptor*, says: "But in cases of positive fraud a different rule applies. . . . The law does not require a prudent man to deal with every one as a rascal, and demand covenants to guard against the falsehood of every representation which may be made as to facts which constitute material inducements to a contract. . . . If representations are made by one party to a trade, which may be reasonably relied upon by the other party, and they constitute a material inducement to the contract, and such representations are false within the knowledge of the party making them, and they cause loss and damage to the party relying on them, and he has acted with ordinary prudence in the matter, he is entitled to relief in any court of justice. In our courts the injured party may bring a civil action in the nature of an action on the case for deceit, and recover the damages which he has sustained; and if the remedy will not afford adequate relief he may invoke the equitable jurisdiction of the court to rescind the contract." The learned justice concedes that in holding the injured party, who had been induced by false and fraudulent representation to make a deed for a tract of land to which the grantor had no title, entitled to maintain an action for damages "seems to be in conflict with previous decisions of this Court," citing *Lytle v. Bird*, 48 N. C., 222; *Credle v. Swindell*, 63 N. C., 305. *Bynum, J.*, in *Hill v. Brower*, 76 N. C., 124, says: "The maxim of *caveat emptor* does not apply in cases where there is actual fraud." In that case the fraud consisted in a false and fraudulent representation in regard to the number of acres in a tract of land. *Knight v. Houghtalling*, 85 N. C., 17; Pollock on Torts, 278; Jaggard on Torts, 570. The plaintiffs, upon the facts testified to by them, were held to have a cause of action for the fraud practiced by defendant's agent.

We are, however, of the opinion that the fraud practiced in this case upon the plaintiffs is in the representation or treaty; the plaintiffs signed the paper-writing which they intended to sign, the fraud consists in the false representation by which such signatures were obtained. The distinction is pointed out by *Battle, J.*, in *McArthur v. Johnson*, 61 N. C., 317, in which he says: "An instance of fraud in the *factum* is when the grantor intends to execute a certain deed, and another is surreptitiously substituted for it." Referring to instances of fraud in the treaty or representation, he says: "In all of them it will be seen that the party knowingly executes the very instrument which he intended, but is induced to do so by means of some fraud in the treaty or some fraudulent representation or pretense." *Shepherd, C. J.*, discussing the question in *Medlin v. Buford*, 115 N. C., 269, says: "A deed made by this species of fraud is said to be void, but it will be found upon examination that

this term is indiscriminately used in connection with any deed which may be avoided either at law or in equity. . . . The distinction between void and voidable deeds becomes highly important in its consequences to third persons, because nothing can be founded on a deed which is absolutely void, whereas from those which are only voidable, fair titles may flow."

It is elementary learning, and common prudence requires, that before signing a deed the grantor should read it, or, if unable to do so, should require it to be read to him, and his failure to do so, in the absence of any fraud or false representations as to its contents, is negligence, for the result of which the law affords no redress. *School Committee v. Kesler,* 67 N. C., 443. But when fraud, or any device, is resorted to by the grantee which prevents the reading, or having read the deed, the rule is different. *Montgomery, J.,* in *Dellinger v. Gillespie,* 118 N. C., 737, says: "It is plain that no deceit was practiced here. It was pure negligence in the defendant not to have read the contract. There it was before him, and there was no trick or device resorted to by the plaintiff to keep him from reading it." *Judge Bynum,* in *Hill v. Brower,* 76 N. C., 124, says: "The representation of B., and his exhibit of the map and plat of the land, and his calculation of the quantity, not only caused the defendant to make no survey, but put to sleep any further inquiry as to the quantity of the land. An actual survey was thus prevented by the artifice and contrivance of the other party." We have discussed this question somewhat above. The fraud here was not in the *factum,* but in the treaty. It did not appear on the face of the deed, but existed outside of it in the *colloquium,* or negotiation, or final contract, that led up to it. The plaintiffs, therefore, were not guilty of any negligence in ascertaining the facts and governing their conduct accordingly, as they were clearly misled and thrown off their guard by the positive representations and assurances of the defendant as to the state of the title. We have shown already what Pollock in his treatise on Torts says about this matter, p. 293. Jaggard on Torts, 595, says: "The law recognizes, in many circumstances, the right of a man to rely upon the statements of another. . . . There is, indeed, a strong inclination on the part of courts to hold, without any qualification, that a person guilty of a fraudulent misrepresentation cannot escape the effects of his fault on the ground of the injured party's negligence." This question has recently undergone examination in a court of another jurisdiction, where it was said: "The doctrine is well settled that, as a rule, a party guilty of fraudulent conduct shall not be allowed to cry 'negligence' as against his own deliberate fraud. Even when parties are dealing at arm's length, if one of them makes to another a positive statement, upon which the other acts (with the knowledge of the party making such statement) in

confidence of its truth, and such statement is *known to be false* by the party making it, such conduct is fraudulent, and from it the party guilty of fraud can take no benefit. While the law does require of all parties the exercise of reasonable prudence in the business of life, and does not permit one to rest indifferent in reliance upon the interested representations of an adverse party, still, as before suggested, there is a certain limitation to this rule, and, as between the original parties to the transaction, we consider that when it appears that one party has been guilty of an intentional and deliberate fraud by which to his knowledge the other party has been misled or influenced in his action, he cannot escape the legal consequences of his fraudulent conduct by saying that the fraud might have been discovered had the party whom he deceived exercised reasonable diligence and care." *Linnington v. Strong*, 107 Ill., 295. And was also considered in another state with similar ruling. *Kilmer v. Smith*, 77 N. Y., 226. "If a bona fide inquiry be made in a proper quarter, and a reasonable answer be given, a man may rest satisfied with the information and need not make further inquiry," and we may add, provided a man of ordinary care and prudence would have relied on it. Kerr on Fraud and Mistake, 256; 1 Big. on Fraud, 528; Fetter's Eq., 136; Biddle on Warranty, sec. 326.

The defendants complain that nowhere in the charge did the judge give the jury any explanation of what fraud is, nor did he tell them what they would have to find in this case in order to justify them in finding fraud. And they complain further, that having permitted a question of fraud to be considered in this case, it became peculiarly the duty of his Honor to distinguish between representations as to title made in good faith, and representations alleged to have been fraudulently made. About all his Honor had to say about fraud was this: "On the other hand, plaintiffs say that it was a scheme from the start by which the defendants managed to exchange some property for which they knew they had no title for the property in South Carolina, which belonged to the plaintiffs. The plaintiffs contend that the defendants wanted to get the South Carolina property, and that, in order to carry out the scheme, the defendants advised the plaintiffs that it was unnecessary for them to employ a lawyer to look up the title; that the title was good, and that they would give the plaintiffs a warranty deed, and that as a result of all this they lost their property in South Carolina, and the defendants got their property, worth $1,000, the payments on which he agreed to protect, and which he did not protect, and that they are the losers thereby. If the plaintiffs have satisfied you by the greater weight of the evidence that the payment of $1,000 by the plaintiffs to the defendants was induced by fraud and misrepresentations, you will answer the fifth issue 'Yes'; otherwise, you will answer it 'No.' The defendants say, as I

stated a moment ago, that there was no fraud, and that they have been at all times ready, able, and willing to protect their contract, but the plaintiffs contend that the defendants told them that there was no use to get a lawyer to look into the title, and that they sold them the tract of land knowing very well that they had no title thereto," and we call attention to the fact that there was no evidence that the defendants ever told the plaintiffs not to secure a lawyer.

The defendants now except, as appears above, because, as they say, there was no evidence that the defendants ever told the plaintiffs not to retain or consult a lawyer. But this kind of exception violates the universal and now well settled rule that if the judge erroneously states a contention, the appellant must have directed his attention to it in seasonable time so that he may correct it and not notice it for the first time in an exception or assignment of error or in his brief, and, besides, we must accept as binding upon us what the judge states was the evidence. *S. v. Burnette,* 184 N. C., 783-784.

While we are of the opinion that the charge on the question of fraud committed by the defendants might well have been more pointed, and the meaning of such fraud as here imputed to the defendants more fully and clearly explained to the jury, we are unable to say that, in the absence of a prayer from the defendants for a more specific instruction, the alleged defect in the charge, if it exists, would justify a reversal in their favor.

To recapitulate in part:

1. The amendment of the complaint and setting the case for trial at October term, less than a month thereafter (C. S., 557), if error, was excepted to only in part, and that the first part of the order, relating to the amendment, as we have shown, which was clearly permissible. The other part of the order, as to the trial at October term, not having been included in the exception, is not now available to the defendants as error, and exception thereto was waived by their silence. Besides, the amendment was merely a more extended statement of the cause of action and not a new cause. *Hardware Co. v. Banking Co.,* 169 N. C., 746, does not apply here.

2. The expression of the witness as to the deposit with the clerk of her check to redeem her interest in the land was palpably harmless, in view of other evidence to the same effect, and was not prejudicial. *Southall v. Shields,* 81 N. C., 28; *Freeman v. Brown,* 151 N. C., 111. This covers exceptions numbers three and four.

3. The court could not have nonsuited the plaintiffs with proper consideration of the evidence, which presented different views, and therefore should have been submitted to the jury.

4. In the absence of prayers for more definite instructions (*Simmons v. Davenport*, 140 N. C., 407), the defendants cannot avail themselves of any defect in the charge as to damages, if there is any. The rules, as stated in *Crowell v. Jones*, 167 N. C., 389, and in *Eames v. Armstrong*, 146 N. C., at p. 9, and in *Bank v. Glenn*, 68 N. C., 35, are conceded to be correct and proper ones, but not applicable here, as there is nothing that brings them into play. His Honor gave instructions as to damages, somewhat general, it is true, but sufficient in the absence of compliance with the established rule as to specific prayers for a better or fuller statement of the law.

A careful analysis of the entire record, in all its varied aspects, has disclosed no reason why the judgment should be disturbed.

No error.

ALICE SPENCE v. THE FOSTER POTTERY COMPANY ET AL.

(Filed 4 April, 1923.)

1. Trusts—Parol Trusts—Equity—Deeds and Conveyances—Registration—Notice.

Certain parol trusts in land are enforceable in this jurisdiction when the holder of the legal title, or those claiming under him, have not acquired it for a fair and reasonable value without notice; and the Connor Act, C. S., 3309, requiring notice by registration as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, necessarily, in contemplation of the express provisions of the statute, refer to such instruments as are in writing and capable of registration.

2. Same—Purchase for Value.

When the plaintiff seeks to engraft a parol trust in his favor against the holder of the legal title to lands, only a bona fide purchaser for value without notice is protected, and this under the broad principles of equity, and creditors expressly referred to in the Connor Act, C. S., 3309, are not included.

3. Sales—Execution—Judgments—Purchaser—Rights Acquired.

A judgment creditor or purchaser at an execution sale can acquire no greater lien or interest in the property of the judgment debtor than such debtor had at the time the judgment lien became effective.

4. Trusts—Parol Trusts—Possession—Limitation of Actions—Statutes—Husband and Wife — Estates — Entireties — Rights of Creditors—Equity.

When it is established that the wife is entitled to have a deed to lands made to her husband corrected to engraft a parol trust on his legal title in her favor, under the doctrine of entireties, or the right of survivorship, allowable between husband and wife, and both have entered into the possession under the husband's deed, which should be corrected for

mistake, etc., and had continued in such possession to the time of the wife's suit, the judgment creditors of the husband can acquire no equitable rights against the enforcement of the parol trust in favor of the wife, the husband having none, though the decree correcting the husband's deed has been entered after the docketing of the judgments, and the suit had been commenced after the claims of the husband's creditors had become valid, and the statute of limitations cannot apply to the enforcement of the wife's equity.

CLARK, C. J., dissenting.

APPEAL by certain judgment creditors, defendants herein, from *Cranmer, J.*, at November Term, 1922, of LENOIR.

Plaintiff, claiming to have an interest in property about to be sold to satisfy demands of judgment creditors of her husband, brought this action to restrain such sales and to have the deed reformed so as to make it show that she and her husband held the estate by entirety, and that it did not belong to her husband individually.

The temporary restraining order was continued to the hearing, and the defendants appealed.

Moore & Croom for plaintiff.
Cowper, Whitaker & Allen for defendants.

STACY, J. According to the allegations of the plaintiff, she and her husband purchased from D. F. Wooten and wife, on 1 November, 1906, a valuable tract of land situate in Lenoir County. One-half the purchase price of said land came from plaintiff's individual funds, derived from sales of property which she had inherited from her parents; and it was the mutual understanding and agreement that the title to said property was to be taken in the name of J. T. Spence and wife, Alice Spence, vesting in them as grantees an estate by the entirety. See *Freeman v. Belfer,* 173 N. C., 581, and *Bruce v. Nicholson,* 109 N. C., 202, for a full discussion of the nature and character of this estate. It is also alleged that by inadvertence or mistake of the draftsmen the deed was made solely to plaintiff's husband, J. T. Spence, omitting plaintiff's name as his wife entirely therefrom. This error was not discovered by the plaintiff nor by her husband until the fall of 1921, when certain judgment creditors of plaintiff's husband, defendants herein, were threatening to levy executions against the property in question and to have the same sold by the sheriff to satisfy their judgments. No answer has been filed in this cause by J. T. Spence, plaintiff's husband, nor by D. F. Wooten, grantor in said deed. The value of the property is stated to be approximately $13,680, while the judgments of the defendants, which were docketed in October, November, and December of the year 1921, amount in the aggregate to about one-half the value of the land. The

plaintiff and her husband have been in the continuous possession of said property since its purchase on 1 November, 1906.

The judgment creditors, defendants and appellants herein, contend that the plaintiff is barred from setting up her interest in the land against their rights and liens, first, by the provisions of the Connor Act, C. S., 3309, and, second, by the statute of limitations, C. S., 445.

The Connor Act of 1885, now C. S., 3309, provides: "No conveyance of land, or contract to convey, or lease of land for more than three years shall be valid to pass any property, as against creditors or purchasers for a valuable consideration, from the donor, bargainor, or lessor, but from the registration thereof within the county where the land lies," etc. It will be observed that this section, in terms, applies only to conveyances of land, contracts to convey, and leases of land for more than three years. Such instruments deal with estates that lie in grant, and, therefore, are required to be in writing under the statute of frauds and under the law of North Carolina. C. S., 988. The primary purpose and intent of the Legislature, in the passage of this act, was to establish a known and ready method for the settlement of conflicting claims and priorities arising from registrations. Hence, from its very nature and purpose it would seem to require that it be restricted to written instruments capable of being registered. There are certain parol trusts, and those created by operation of law, dealing with beneficial interests in lands, which are fully recognized in this jurisdiction. *Jones v. Jones*, 164 N. C., 320, and cases there cited. And it has been held with us consistently that these trusts, though resting in parol, or not evidenced by any writing, may be enforced against the holder of the legal title, unless it appear that such holder, or some one under whom he claims, has acquired his title for a fair and reasonable value and without notice of the trust. Here it will be observed that a bona fide purchaser for value without notice (but not a creditor) is protected against the claim of one in whose favor the trust is sought to be established, not by virtue of the terms of the Connor Act, but on the broad principles of equity.

As said by *Andrews, J.*, in *Newton v. Porter*, 69 N. Y., 133: "It is immaterial in what way the change has been made—whether money has been laid out in land or lands laid out in money, or how the legal title to the converted property may be placed—equity only stops the pursuit when the means of ascertainment fail or the rights of bona fide purchasers for value, without notice of the trust, have intervened. The relief will be moulded and adapted to the circumstances of the cases so as to protect the rights of the true owner."

Thus, we apprehend, if these estates are to be preserved, it must be held that parol trusts, and those created by operation of law, such as are recognized in this jurisdiction, do not come within the meaning and

purview of the Connor Act. No doubt these trusts were purposely omitted from its terms for the reason that, being incapable of registration because not in writing, it was considered unfair and subversive of right to destroy them in favor of one who had acquired his title with full knowledge of their existence. See concurring opinion of *Hoke, J.,* in *Pritchard v. Williams,* 175 N. C., 326, and opinion of *Connor, J.,* author of the act, in *Wood v. Tinsley,* 138 N. C., 507. See, also, *Roberts v. Massey, ante,* 164. Where the statute does not apply, of course, those mentioned in the statute can claim nothing under it.

In *Bell v. Couch,* 132 N. C., 346, it was held that wills are not within the operation of the act, *Connor, J.,* saying: "The evil which it was intended to remedy was the uncertainty of titles to real estate caused by persons withholding deeds, contracts, etc., based upon a valuable consideration, from the public records"; and the same judge, in *Skinner v. Terry,* 134 N. C., 309, referring to a decree directing a title to be made in an action for specific performance, said: "We would not feel authorized to extend the language of Laws of 1885, ch. 147, to include a decree of the character before us in the record."

The Connor Act is modeled after and is in almost the same language as the act requiring the registration of mortgages and deeds of trust (*Wood v. Tinsley,* 138 N. C., 509); and it was held in *Wittkowsky v. Gidney,* 124 N. C., 441, that an equity to correct a deed could be enforced as against one holding a registered mortgage. It was also held in *Sills v. Ford,* 171 N. C., 733, that this equity for correction may be enforced against a purchaser, claiming under a registered deed, who bought with notice of the equity.

The decision in *Ray v. Long,* 128 N. C., 90; *S. c.,* 132 N. C., 891, is authority for the establishment of a trust like the one here alleged. We are not now concerned with whether or not the plaintiff can make out her case. In support of his Honor's judgment, this will be assumed for present purposes.

It is further contended by appellants, who are judgment creditors of J. T. Spence, that plaintiff's right, if any she has, is now barred by the lapse of time, and they therefore plead the statute of limitations. The plaintiff and her husband have been in the continuous possession of said property since its purchase in 1906, without any apparent abandonment of plaintiff's right, and this, under the authorities, would seem to protect her claim against the bar of the statute. Speaking to a similar question in *Stith v. McKee,* 87 N. C., 391; *Ruffin, J.,* said: "The one may preclude himself by his laches from asserting a right which otherwise the courts would help him to enforce, there are abundant authorities to show. But to do so in any case, there must be something on his part which looks like an abandonment of the right, or an acquiescence in its enjoy-

ment by another, inconsistent with his own claim or demand, and accordingly we have searched in vain for a single instance in which a court has withheld its aid in the enforcement of an equity, on the ground of the lapse of time when the party seeking it has himself been in the continued possession of the estate to which that equity was an incident." See, also, *Mask v. Tiller,* 89 N. C., 423; *Flanner v. Butler,* 131 N. C., 156; *Norton v. McDevit,* 122 N. C., 759. The husband's possession is considered to be the possession of the wife also, where they are living together. *Faggart v. Bost,* 122 N. C., 520.

A judgment creditor, or even a purchaser at an execution sale, acquires no greater lien or interest in the property of the judgment debtor than the latter had at the time the judgment lien became effective. Such was the direct holding in *Bristol v. Hallyburton,* 93 N. C., 387: "A sale under an execution upon a judgment which is a general lien on all property of the debtor, vests only the interest of the debtor at the time the judgment lien attaches, or such as the debtor might have conveyed by a suitable instrument for a valuable consideration. It is limited to and can rise no higher than the interest of the debtor; a stream cannot rise higher than its fountain. A purchaser under an execution takes all that belongs to the debtor, and nothing more," citing Herman on Executions, sec. 360.

We express no opinion on the merits of the case, but simply affirm his Honor's ruling in continuing the restraining order to the hearing.

Affirmed.

CLARK, C. J., dissenting: On 1 November, 1906, D. F. Wooten and wife conveyed in fee simple to J. T. Spence, the husband of the plaintiff, the lands referred to; the deed was properly probated and recorded in Lenoir, 2 February, 1907, and has continuously appeared on record since that date as a deed to J. T. Spence. The appellants have for 15 years been dealing with said J. T. Spence, and have given him credit from time to time upon examination of the records and upon implicit faith that he owned the land as appears from said records. Said Spence, from time to time having obtained large credits upon the faith of the ownership of the land, finally failed to make payments, and the several defendants herein obtained judgments in the amounts appearing in the exhibits in this cause, which were docketed in October, November, and December, 1921.

The defendants, judgment creditors, then proceeding to enforce the judgment by executions issued therein on 30 January, 1922, the *feme* plaintiff instituted suit against her husband and those holding judgment liens on the land to have the deed, made 15 years previous to her husband, decreed to be a deed to herself and husband by entireties,

alleging that at the time of the making of the deed it was understood by her husband and the grantor that the title should be vested in herself and her husband as tenants by the entireties. It is not alleged that the wife had any such understanding, which was between her husband and the grantor. It is alleged, it is true, that the land was paid for partly by her husband and partly out of the proceeds of sales of lands which she had inherited from one or both of her parents, but she does not state the exact amount of her funds, nor does she specify the lands out of which it came, nor does she appear to know whether it came from one or both of her parents. It is further alleged that her husband did not discover the said error until the fall of 1921, and that only thereafter did he disclose his mistake to her.

There is but one single question presented, and that is whether the claimant of a parol trust under these circumstances, after the lapse of 15 years, can have the title passed to her by decree of court in priority to the liens of valid judgments duly docketed against the debtor.

This question has been answered in the negative by several decisions of this Court, and, notably, by two of very recent date. In *Wimes v. Hufham,* filed at this term, it was held, *Stacy, J.,* that where the judgment against a party is regular in all respects, the lien of such judgment has priority against an unregistered mortgage, which had effect only from registration thereof. That case relies upon *Mills v. Tabor,* 182 N. C., 722 which holds that where there is a lien by judgment against the holder of an equitable title under a registered mortgage from a grantee under an unregistered deed to secure the balance of the purchase money, the judgment lien takes priority over the mortgage when the deed to the mortgagor was not registered until after the docketing of the judgment. That is, that the judgment creditor has priority over the mortgagee even under a prior registered mortgage when the mortgagor's title was registered after the judgment lien against his grantor had been acquired by docketing. It follows, therefore, that if there is a parol trust which the holder thereof was entitled to have executed by the trustee, and the trustee executes such deed, but it is not registered until after a judgment obtained by a creditor of the trustee has been docketed, the judgment lien has priority. When, therefore, the holder of the parol trust does not even have the same executed by deed, he certainly cannot be in a better position than one to whom the trustee has actually conveyed, but who has not registered his deed until after the docketing of the judgment against such trustee.

C. S., 3309, known as the "Connor Act," on its face was intended to protect "*creditors* or purchasers for valuable consideration." It did not have as its sole object protection to purchasers for value, but includes in its alternative terms "creditors." The title in this case had been vested,

on the record, in J. T. Spence for 15 years, and a deed from him would have unquestionably given a good title to a purchaser for value and without notice of claim of the wife, as in this case; and creditors, under C. S., 3309, who have extended credit upon the faith of the said recorded deed, and without notice of the claim of the wife, and especially those who have acquired judgment liens, cannot be defeated by a decree for the execution of a parol trust after the docketing of the judgment liens.

It matters not whether the party asserting the parol trust was the wife or any other person for the fact that the wife lived on the premises with the husband was no notice to the public of any claim by her of title to the land by parol trust or otherwise. The only difference is that if this claim can be substantiated, it aggravates the injustice to the judgment creditors because if the estate by the entireties can thus be set up and proven, after the lapse of 15 years, it would bar the creditors from collecting anything by a sale under execution against the husband of any interest whatever in the lands.

In *Latham v. Latham,* 184 N. C., 64, at p. 65, quoting from *Dunn v. Beaman,* 126 N. C., 771, the Court said that when the facts appeared in the record that the parties are affected with notice. In that case the land was devised in 1844 to the children of John R. Beaman; the father qualified as guardian for the children and filed an *ex parte* petition for sale of the land, the sale was confirmed, and the guardian received the purchase money, but his children did not know until three years prior to the beginning of their action that the land had ever been devised to them, that their father was guardian, or that the land had been sold. The children relied on the ground that they had discovered the facts only within three years. Their contention was not sustained, but it was held that their cause of action was barred. The Court said: "The children had legal notice of the facts. The will of Carraway, under which that title accrued, was probated and recorded in 1844, and the land devised to them was sold for partition in 1861"; but the Court held that the conveyance to the purchasers was notice to the children as well as to all the world. In the case at bar the deed to the husband was registered, which was notice to the wife as well as to all the rest of the world.

In *Cox v. Brower,* 114 N. C., 422, *Burwell, J.,* said: "No person ought to be permitted to lie by while transactions can be fairly investigated and justly determined until time has involved them in uncertainty and obscurity, and then ask for an inquiry. Justice cannot be satisfactorily done when parties and witnesses are dead, vouchers lost or thrown away, and a new generation has appeared on the stage of life unacquainted with the affairs of a past age. . . . Hence, statutes of limitation have been enacted in all civilized communities, and in cases

not within them, prescription or presumption is called in as an indispensable auxiliary to the administration of justice."

The application of these principles cannot be more clearly illustrated than in the present instance. The creditors, after investigating the record, finding the property vested in the husband by a fee-simple title from the previous owner registered 15 years, extended credit to the grantee. If now the wife can set up an alleged oral and secret agreement with her husband, it would be impossible for the creditors to investigate the alleged transaction or disprove her statement of the sources from which the money came which the husband used in the purchase of this property.

If the contention of the plaintiff in this case is sustained, there can be no credit safely extended to any husband except upon a mortgage duly executed with joinder of the wife. Indeed, it would not be safe to extend credit to any man whatever, except upon a mortgage, if upon allegation of an oral trust after the lapse of 15 years title can be decreed to be in the claimant superior to the lien of docketed judgments.

In *Dunn v. Beaman, supra,* the children were not allowed to recover upon the allegation of a trust after the lapse of 3 years. The statute of limitations would run against a wife where she has a claim against her husband as fully as against any one else, *Graves v. Howard (Allen, J.),* 159 N. C., 594, for a wife can maintain an action against her husband as fully as against any one else. C. S., 454 (2); *Crowell v. Crowell,* 180 N. C., 516. Coverture is now no defense to her, *Carter v. Reaves,* 167 N. C., 132; *Manning v. Manning,* 79 N. C., 293, and statutes of limitations apply against the wife as if single.

If in this case the action is on the ground of mistake in the omission of the wife's name from the deed, three years is a complete bar against her as against any one else, C. S., 441 (9); and if on any other ground she would be barred by the 10 years statute, C. S., 445, and cases cited under that section. But even if the husband could not have the benefit of the statute as against his wife, it is very certain that the creditors who acquired a lien upon his property by virtue of the prior docketed judgments would be protected. *Mills v. Tabor,* 182 N. C., 722; *Wimes v. Hufham, ante,* 178.

The plaintiff relies upon *Wittkowsky v. Gidney,* 124 N. C., 441, that an equity to correct a deed can be enforced even against one holding a registered mortgage so that even a registered mortgage would be no protection. But in that case the deed was executed on the homestead without the joinder of the wife, and therefore on its face it was invalid and notice to the party taking it.

Nothing of that kind appears in the present case, for here John T. Spence took a deed for this property which upon its face was valid in

every respect. It was duly recorded, and for 15 years the defendants have been extending credit to him upon the faith of his ownership of the property. There was no equity of any kind, or any circumstances, putting these creditors on notice of any defect. As already said, the fact that the wife was living with her husband, was no notice of any assertion of title by her as against him or against his creditors, C. S., 3309.

The plaintiff also relied upon *Sills v. Ford*, 171 N. C., 733, where the Court held that the equity for correction may be enforced against the purchaser claiming under registered deed who bought with notice of the equity, and the same is true in *Ray v. Long*, 128 N. C., 90; *S. c.*, 132 N. C., 891, where the establishment of the interest of the wife was based upon notice of the equity.

If it were true that the wife in this case, where there was no notice of an equity, could assert an oral trust for the conveyance of land because of alleged advancement of part of the purchase money to the detriment of creditors who have dealt with the husband upon faith of his property and have acquired judgment liens thereon, then it would follow that any other person whatsoever who has made advancements on an oral trust to be used as part of the purchase money, could have a decree for conveyance to the detriment of creditors after any lapse of time to the utter destruction of all credit upon the faith of property recorded in the name of the debtor.

If the debtor, upon receiving the purchase money, or thereafter, on such alleged trust, had actually executed a deed which remained unregistered, the creditor who holds a judgment or other lien on record has a superior right to the claimant under the unregistered deed, C. S., 3309. By no process of reasoning can one who has advanced money upon a verbal unexecuted agreement to convey, be in a better situation than one to whom the debtor has actually executed a deed, but which has not been registered.

As already stated, the possession of the husband is no notice to his creditors of an equity, or of an oral trust, in favor of the wife, certainly not as against her husband's judgment creditors who have extended credit in good faith and obtained judgment liens. If this were not so, it would be a most serious blow to business dealings in this State. Credit cannot be extended upon any sort of certainty if after an investigation of the records it being found that the proposed debtor owns property entitling him to credit, and he has in consequence thereof obtained large credits and judgment liens have been acquired against him, his registered deed can be set aside by his wife, or any one else, upon the allegation of an oral trust of which the creditors had no notice. The late case of *McNinch v. Trust Co.*, 183 N. C., 33, fully sustains the contentions of the defendant in this case.

The cases in which a wife has procured a decree upon an oral trust making her a tenant in entireties with her husband have no application against the holders of the docketed judgments upon the circumstances of this case, and the restraining order against the judgment creditors in this case should have been denied.

UNITED STATES RAILROAD ADMINISTRATION v. HILTON LUMBER COMPANY.

(Filed 4 April, 1923.)

1. **Courts — Instructions—Expression of Opinion—Statutes—Evidence—Appeal and Error.**

Where the evidence upon the trial is permissible of more than one construction or different inferences may be drawn therefrom, peremptory instructions directing a verdict thereon in favor of either party to the controversy is an expression of an opinion thereon by the trial judge, forbidden by our statute, and constitutes reversible error. C. S., 564.

2. **Same—Government—Railroads—Embargo.**

Where there is evidence tending to show that one authoritative division of the United States Railroad Administration during Government control had laid an embargo on shipments, and there is also evidence that the shipment in question was for Government purposes, and should have, as an exception, been received and shipped by the initial carrier under a special permit of another authoritative division of the administration, with further evidence that the cars had been placed and partially loaded for shipment before the special permit had been recalled: *Held*, a peremptory instruction in favor of the railroad administration on the issues as to whether it had lawfully refused to receive the shipments tendered, is in contravention of our statute forbidding the trial judge to express his opinion to the jury upon the weight or credibility of the evidence. C. S., 564.

3. **Government—Railroads—Embargo—Special Shipping Permit—Loading—Transportation.**

The placing of a car in position to be loaded by the shipper under a special permit during an embargo laid thereon during Government control as a war measure, and permitting the shipper partially to load it on the car before the special permit has been recalled, is some evidence that the special permit has been authorized; and the partial loading of the car may be considered as the commencement of the shipment and take it out of the purview of a general order by the Railroad Administration thereafter issued prohibiting such shipments during the continuance of the embargo.

4. **Government—Railroads—Embargo—Loading Cars—Damage.**

Where, under the control of the Government of railroads, as a war measure, a shipper has loaded a car subject to an embargo placed thereon, he may lawfully be required to unload the car at his own expense.

5. Damages—Diminution—Duty of Party Damaged—Government—Railroads—Election of Remedies.

Where a shipper has loaded a carload shipment during an embargo placed on shipments during Government control of railroads, and defends the action of the administration to recover demurrage charges, etc., upon the ground that he had the right to ship under a special permit, and alleges a counterclaim for damages, he may not successfully contend that the plaintiff should have unloaded the car and have minimized the damages, when he had forbidden the plaintiff to enter the car and prevented its doing so, having elected to stand upon his initial rights.

6. War—Railroads—Connecting Carriers.

Each railroad, under Government control as a war measure, was an integral part of the combined railroads into one system; and where an embargo had been placed in the territory of a connecting carrier, the initial carrier was not required to accept a shipment and transport it to its terminus. *Cotton Mills v. R. R.*, 150 N. C., 614, cited and distinguished.

APPEAL by plaintiff and defendant from *Connor, J.*, at December Term, 1921, of NEW HANOVER.

Civil action to recover demurrage, unloading, storage charges, and war taxes incidental thereto on three cars of lumber loaded and tendered by defendant to plaintiff for shipment, same being refused. The defendant in its answer denied liability for said charges, and set up a counterclaim for damages for the wrongful sale and conversion of defendant's lumber on the cars.

There were three carloads of lumber involved in this controversy, but for the purpose of the trial and appeal they were treated as two separate shipments, as two of the cars were placed and loaded on the same date and were claimed to be embraced in permits issued by the Freight Traffic Committee, North Atlantic Ports.

On 18 March, 1918, the defendant having sold to the Government a carload of lumber consigned to Lieutenant-Colonel R. H. Rolfe, Quartermaster Corps, U. S. A., Guenther's Siding, Philadelphia, Pa., was furnished with a placard by the War Department for the movement of said shipment over embargoes, and denominated "Red Balled." Defendant applied to the plaintiff's agent at Wilmington, N. C., and inquired if freight consigned to the United States officer at Guenther's Siding would be accepted and forwarded, as had previously been done, and the defendant, upon being informed that it would, requested the plaintiff's agent to place on the siding at the defendant's mill a car to be loaded and shipped, and this was done.

On 20 March, 1918, the defendant's manager met the yardmaster of the Seaboard Air Line and informed him that the defendant held F. T. C. permits, covering two carloads of lumber, which were about to expire, and asked the yardmaster if he could not furnish two cars to be

loaded and transported under said permits. Whereupon, at 5 p. m. that day the plaintiff placed two cars for such loading on the siding at the defendant's mill, and on the morning following the defendant began the loading of the cars, which it completed and tendered bill of lading to the plaintiff on the 22d for said shipment, but these shipments were declined.

The defendant offered evidence that the value of its lumber was $2,463.24. The demurrage and war tax on the three cars was $2,987. The jury found the plaintiff was entitled to storage of $656.89, plus war tax, and interest from 22 September, 1918. The actual cost of unloading, war tax and storage, according to the tariff fixed by the Interstate Commerce Commission, was $3,067. The jury, responding to the issues submitted, found: (1) That the plaintiff lawfully refused to issue bills of lading to defendant on 18 March for the carload of lumber, destination Guenther's Siding, Philadelphia, Pa.; (2) that the plaintiff was entitled to recover no demurrage therefor; (3) that the plaintiff, on 21 March, 1918, lawfully refused to issue bills of lading for the two cars loaded with lumber, destination New York and Brooklyn; (4) that on account thereof the plaintiff was entitled to recover for storage $656.89, plus war tax, and interest from 22 September, 1918, and (5) that the defendant is entitled to recover of the plaintiff on account of the lumber loaded on said cars and sold by the plaintiff, $2,463.24.

The court rendered judgment in favor of the defendant and against the plaintiff, James D. Davis, agent of the U. S. Railroad Administration, in the sum of $2,204.27, with interest from first day of the trial term, being the amount due by the plaintiff after deducting the allowance for storage, interest, and war tax, on the fourth issue.

Both the plaintiff and defendant appealed.

John D. Bellamy & Sons for plaintiff.
E. K. Bryan for defendant.

STACY, J., after stating the case: The jury found in answer to the first and third issues that the plaintiff lawfully refused to accept the two shipments tendered by the defendant, the one car on 18 March, 1918, for delivery at Guenther's Siding, Philadelphia, and the two cars on 22 March, 1918, for delivery at New York and at Brooklyn. These responses were made under binding instructions from the court, or what amounted to peremptory instructions, for his Honor told the jury that if they believed the evidence and found the facts to be as testified to by the witnesses, they would answer the first and third issues in favor of the plaintiff. We think this charge must be held for error under our practice, which requires a finding by the jury, without expression of opinion from the court (C. S., 564), where the evidence is permissible

of more than one construction, or is such that different inferences may be drawn therefrom. *Kinney v. R. R.*, 122 N. C., 965. "Where the testimony is conflicting upon any material point, or more than one inference may be drawn from it, it is the province of the jury to find the facts or to make the deductions." *Avery, J.*, in *Russell v. R. R.*, 118 N. C., 1111.

It is conceded that at the time these shipments were tendered this country was at war with the Imperial German Government; that the railroads over which they were to be carried had been taken over by the Government of the United States, and were being operated by the President, under a Director General of Railroads. *Missouri Pac. R. Co. v. Ault*, 256 U. S., 554. It is further conceded that in order to avoid congestion and accumulation of freight at junction points, and particularly points north of the Virginia gateways, certain embargoes had been laid by the Car Service Section, Division of Transportation, United States Railroad Administration, or under its authority, and that these shipments were prohibited by the terms of said embargoes, unless permitted under certain exceptions and permits issued by proper legal authority.

For the carload of lumber tendered on 18 March, and consigned to Col. R. H. Rolfe, Quartermaster Corps, U. S. A., Guenther's Siding, Philadelphia, Pa., defendant contends that it had been furnished with a placard, denominated "Red Balled," and issued by the War Department, which took precedence in authority over embargoes. W. C. Kendall, witness for the plaintiff, testified that he was manager of the Car Service Section of the Division of Transportation, United States Railroad Administration, and in charge of the issuance of circulars and general regulations concerning embargoes, except the War Department circular. Speaking of this, the witness said: "That (the War Department circular) was known as Order No. 2 of the Director of Inland Transportation of the War Department, U. S. W. D., and is a War Department authority to issue placards that would prevail over embargoes." Defendant contends that its placard, denominated "Red Balled," was issued under authority of this order, and that it was the duty of the plaintiff to honor the same. But there is evidence on the record tending to show that Order No. 2, issued under date of 18 February, 1918, was modified or changed by Order No. 3, issued by the Car Service Section, Division of Transportation, United States Railroad Administration, under date of 25 February, 1918. This latter order, however, was not offered in evidence, though it does appear from Supplement 2 to S. A. L. Embargo 749-1, issued under date of 11 March, 1918, that "carload shipments for account of U. S. War Department may be made in accordance with provisions of C. S. Order No. 3."

There was further evidence tending to show that these red labels or placards were treated and considered as exceptions to embargoes; while L. P. Sneeden, witness for plaintiff, testified that the embargoes in force at that time on the Baltimore & Ohio and the Pennsylvania Railroads, "prohibited our road from accepting these shipments." But the following appears in the embargo laid by the Pennsylvania Railroad: "Carload shipments for account U. S. War Department may be made in accordance with General Notice No. 141, 7 March, 1918, setting forth provisions of Circular C. S. No. 3, issued by the Car Service Section, Division of Transportation, U. S. R. R. Administration." Thus we have a disputed question of fact, or rather a mixed question of law and fact, with the evidence at least equivocal if not contradictory as to whether the defendant's placard, denominated "Red Balled," was in force and subsisting as a valid exception to embargoes at the time the shipment in question was tendered. *U. S. v. Metropolitan Lumber Co.,* 254 Fed., 337. No doubt this point will be clarified or made certain on another hearing.

The evidence is conflicting as to whether the defendant had commenced loading the two cars, intended for shipment to New York and Brooklyn, before the plaintiff's agent notified the defendant, on 21 March, that these cars would not be received for transportation. They had been sent to defendant's yard the day before to be loaded and shipped under "F. T. C. Permits." These permits were issued by the Freight Traffic Committee of New York or for the North Atlantic Ports; said committee having been appointed by the Assistant Director General of Railroads with authority to issue the permits in question. The purpose of issuing these permits, which might be used as exceptions to or in the face of embargoes, was to enable the committee to regulate the flow of traffic into the North Atlantic Ports. The permits were issued to the consignees, who in turn sent them to the shippers to be used by them in tendering shipments to the carriers' local agents at points of origin. *Baltimore Chamber of Commerce v. B. and O. R. R. Co.,* 45 I. C. C. Reports, p. 42. It is in evidence that the plaintiff's agents honored these F. T. C. Permits in large numbers, before and after they refused to accept the cars offered by defendant for shipment. There is also evidence tending to show that some of the railroads, including the Seaboard Air Line, had authority to issue embargoes against shipments tendered with F. T. C. Permits. But it was customary for the eastern railroads under embargoes to honor said permits, except in extreme cases, where it was necessary to embargo all commodities.

On 18 March, 1918, plaintiff's agent at Wilmington, N. C., received the following telegram from C. E. Hix, Superintendent of Transporta-

tion: "Understand Hilton Lumber Company offering at Wilmington several shipments on F. T. C. Permits. Instruct that they be accepted."

Fearing that this might be considered a general rather than a specific instruction, on 19 March, the following telegram was sent to the agent and assistant general freight agent at Wilmington, and also to the superintendent at Hamlet: "Understand Hilton Lumber Company at Wilmington have loaded three cars covered by F. T. C. Permits, via Norfolk, which were tendered 16 March, and also one car for Captain H. B. Hines, Quartermaster, New York. O. K. to accept routed via N. Y. P. & N. However, in future shipments on F. T. C. Permits must not be accepted until handling with this office."

Later, on 21 or 22 March, embargo 886-33 was laid by the Seaboard Air Line against all freight, with certain exceptions, going north of Richmond. According to its own terms: "This embargo applies to Government freight not included in above exceptions, and automatically stops further placement of cars for loading on various permits with the exceptions of those named above. S. A. L. all freight via R. F. & P., Richmond, Va."

Defendant contends that the cars in question are not affected by S. A. L. embargo 886-33, because they had already been placed by plaintiff's agent, and were then in process of being loaded. The embargo on its face "automatically stops further placement of cars for loading on various permits," and hence, it is the contention of the defendant that it could not apply to cars which had previously been placed for loading. Defendant also contends that the telegram of 19 March was not an embargo, but only an instruction to the agents as to how to proceed in the future with respect to honoring F. T. C. Permits. This was not communicated to the defendant, but plaintiff's agent sent the cars in question to defendant's yard after receiving said telegram, and defendant says there is no evidence appearing on the record to show that he exceeded his authority in placing these cars.

In reply to this, plaintiff says there were other and older embargoes (General Order No. C. S. 17, issued 15 January, 1918, effective 21 January, 1918, and Circular No. C. S. 1, issued on 11 February, 1918, by the Car Service Section, Division of Transportation, United States Railroad Administration), which were effective against these shipments, and that the plaintiff was under no obligation to honor F. T. C. Permits in the face of these embargoes.

With our present understanding of these permits, and the purpose they were intended to serve, we would be disposed to accept the plaintiff's view of the matter but for the dispute, arising on the record, as to whether or not the plaintiff, under its practice and dealing with respect to these permits in the face of embargoes, did actually honor the very permits

in question. Defendant says it did. Plaintiff says it did not. This is a question of fact. *Ill. Cent. R. R. v. Ashmead,* 58 Ill., 487.

Defendant contends that the cars had been placed in its yard and actual loading begun before S. A. L. embargo 886-33 was laid. It further says that, according to plaintiff's own testimony, embargoes were not to become effective until twenty-four hours after midnight of the date of issuance; and that, therefore, this embargo was not in force on 22 March when shipment was tendered. H. H. Elliott, witness for plaintiff, testified: "As a general proposition, my understanding is that if an embargo was issued and freight tendered within 24 hours it was the duty of the agent to receive the freight. It was generally understood that cars in the process of loading were to be regarded as being in transit."

On the other hand, it is the contention of the plaintiff that the defendant knew the permits in question could not be honored without first submitting the matter to the Superintendent of Transportation for his approval; and that, at the solicitation of defendant's manager, the cars were placed subject to such approval, with the understanding that defendant, according to its own testimony, was only "taking a shot," or a chance, on having the permits honored. Defendant's manager explains this by saying that, after looking over the embargo file, which was open to public inspection in the office of the Seaboard Air Line at Wilmington, N. C., he was willing to "take a shot," because it seemed perfectly clear to him that said shipments were in order. Plaintiff, in reply, says that such inspection could not prevail over the embargoes, which defendant's manager evidently failed to see, as they were there on file, and further, the telegram of 19 March from the Superintendent of Transportation was specific as to how F. T. C. Permits were to be handled in the future.

Of course, if the defendant were not in position to insist upon these cars being accepted by the plaintiff for shipment, it was the duty of the defendant to unload them. Circular No. C. S. 1, mentioned above, and issued by authority of the Director General of Railroads, provides: "Cars must not be loaded in violation of embargoes. When this is done, agents are not permitted to issue bills of lading, and if cars are not unloaded they will be held at points of origin subject to current demurrage charges until unloaded or until embargo is lifted." On the other hand, if the permits in question had actually been honored and the cars accepted as freight for shipment, the plaintiff was in the wrong in declining to deal with them as such.

But defendant contends that it should not be held liable for demurrage in any event after notice to plaintiff's agent of its refusal to unload the cars; because, defendant says, the duty then devolved upon the plaintiff to minimize its loss by itself having the cars unloaded. *Yowmans v.*

Hendersonville, 175 N. C., 574. Ordinarily, the defendant might avail itself of this principle of law, but there is evidence on the record permitting the inference that the defendant would not allow the plaintiff's agent to go upon its premises for the purpose of unloading said cars. If this be the case, it would seem that the defendant should abide by its election to stand upon its initial rights, whatever they were. These, as we have indicated above, must be determined by the jury's finding on the disputed facts. *Elam v. Realty Co.,* 182 N. C., 603; *Shaw v. Greensboro,* 178 N. C., 426.

There is no disposition on the part of the defendant to question the right of the United States Railroad Administration to lay embargoes for the proper conduct of the several systems of transportation while under Federal control. This could hardly be a debatable question, in view of the overshadowing necessity which caused the Government to take over the railroads in 1917, and it is a matter of common knowledge, as shown by the record, that in March, 1918, the Railroad Administration was face to face with acute problems of transportation. *Baltimore Chamber of Commerce v. B. and O. R. R. Co.,* 45 I. C. C. Reports, 40. See, also, opinion of *Walker, J.,* in *York v. Jeffreys,* 182 N. C., 452. Nor is there any suggestion, on the present record, that the embargoes in question were unreasonable, or unjustly discriminatory. Indeed, each side has undertaken to establish the correctness of its position by virtue of authority derived from the same source, to wit, the embargoes on the one hand and exceptions thereto on the other. However, as bearing upon this question, the following authorities may be of service or interest: *U. S. v. Metropolitan Lumber Co.,* 254 Fed., 348; *Penna. R. R. Co. v. Sonman Coal Co.,* 242 U. S., 121; *Penna. R. R. Co. v. Stineman Coal Co.,* 242 U. S., 298; *Penna. R. R. Co. v. Puritan Coal Co.,* 237 U. S., 121; *Hocking Valley R. R. Co. v. U. S.,* 210 Fed., 735; Hutchinson on Carriers, 146.

The principle announced in *Cotton Mills v. R. R.,* 150 N. C., 614, to the effect that the initial carrier, in order to relieve itself from liability, must accept goods offered for shipment, where it is able to do so, and tender them to its connecting carrier, even in the face of an embargo laid by the connecting or delivering carrier against the consignee, can have no application to the facts appearing on the instant record. Although each railroad (not the owner company), as an integral part of the whole system then under Federal control, was authorized by the Car Service Section, Division of Transportation, United States Railroad Administration, to lay certain embargoes in order to avoid congestion on its own yards and over its own lines, yet this was but a part of one entire system, and it would be idle to say that embargoes laid by railroads north of the Virginia gateways could have no effect upon the Seaboard Air Line in

accepting freight for delivery into territory of the North Atlantic Ports. *Smith v. A. C. L. R. R. Co.,* 50 I. C. C. Reports, 227. "The Railroad Administration, established by the President in December, 1917, did not exercise its control through supervision of the owner companies, but by means of a Director General, through 'one control, one administration, one power for the accomplishment of the one purpose, the complete possession by governmental authority to replace, for the period provided, the private ownership theretofore existing.'" *Mr. Justice Brandeis* in *Mo. Pac. R. Co. v. Ault,* 256 U. S., 557, citing *Northern P. R. Co. v. North Dakota,* 250 U. S., 135.

The record discloses other exceptions worthy of consideration, but, as they are not likely to arise on another hearing, we shall not consider them now. There must be a new trial of the whole case. Each side will pay its own costs incurred on this appeal, with the right to have the same taxed ultimately against the losing party.

New trial.

B. H. COLE ET AL. v. ESTELLA McDOUGALL REID ET AL.

(Filed 4 April, 1923.)

Evidence—Questions for Jury—Trials—Executors and Administrators—Sales.

With the consent of the administratrix, concurred in by the heirs at law, the administratrix being one of them, the lands of the decedent were sold by the mortgagee under the power of sale in his mortgage, in preference to a sale by the administratrix, to acquire assets for the payment of the debts of the estate. The administratrix being the last and highest bidder, took deed to herself individually, paid off the mortgage, and used the residue of the purchase price as assets in her hands as administratrix, afterwards she sold the land for a much larger price. There being conflicting evidence as to whether she had purchased individually or as administratrix: *Held,* in the action of the other heirs at law to recover the excess, it presented an issue of fact for the jury to determine.

APPEAL by plaintiffs from *Connor, J.,* at September Term, 1922, of DURHAM.

Civil action to require an accounting, and to recover of defendant funds which plaintiffs allege rightfully belong to the estate of Dicey McDougall, deceased, in which they are interested.

At the close of plaintiffs' evidence, upon motion of defendants, his Honor entered judgment as of nonsuit. Plaintiffs appealed.

R. O. Everett and J. R. Patton, Jr., for plaintiffs.
Brogden, Reade & Bryant for defendants.

STACY, J. Viewing the evidence in its most favorable light for the plaintiffs, the accepted position on a motion to nonsuit, we find the following facts sufficiently established, or as reasonable inferences to be drawn from the testimony:

On 20 July, 1914, Dicey McDougall died intestate, leaving her surviving six children, the five plaintiffs herein, and the defendant Estella McDougall, who afterwards married her codefendant, Garland Reid. The deceased, at the time of her death, owned two tracts of land situate in Harnett County, containing 100 acres and 33 acres respectively, and both under mortgage to one H. D. Cameron. The 100-acre tract is the only one here in dispute.

On or about 12 August, 1914, the defendant Estella McDougall Reid qualified as administratrix of her mother's estate. In order to avoid the expense and necessity of having the land in Harnett County sold to make assets to pay the debts of the deceased, it was thought best to have the mortgagee foreclose his mortgage, which amounted to $265. Accordingly, in the fall of 1914, at the instance of the administratrix, the mortgagee advertised the property for sale, but on further instructions from the said defendant, the sale was not had at that time.

Later, in 1917, the mortgagee again advertised the property for sale under his mortgage. The defendant administratrix attended the sale and became the last and highest bidder of the 100-acre tract—the only one sold—at and for the price of $1,000. She paid the mortgagee the amount of his debt and took a receipt from him for the balance. A few months later she sold the property in question for $3,500.

Defendant concedes that she should account for the $1,000, less the mortgage debt, but denies that she is in any way responsible to her brothers and sisters, or to the other heirs, for any greater sum. We think this question must be determined by the jury's finding as to whether or not she was purchasing, or under all the facts and circumstances should be held to have purchased, for the benefit of the estate when she bought the land at the mortgagee's sale. The evidence is conflicting on this point, and it would serve no good purpose to set it out in detail, as the question can only be determined by the jury. The evidence is sufficient to warrant a finding either way.

Both sides rely upon the same authorities, *Winchester v. Winchester,* 178 N. C., 483; *Wilson v. Vreeland,* 176 N. C., 504; *Froneberger v. Lewis,* 79 N. C., 436, and we see nothing in the case at bar to call for a restatement of the principles announced in these cases, especially in the last one cited.

The judgment of nonsuit will be reversed, and the cause remanded for another hearing.

Reversed.

HENRICO LUMBER COMPANY v. DARE LUMBER COMPANY ET AL.

(Filed 4 April, 1923.)

1. **Corporations — Deeds and Conveyances—Seal—Evidence—Nonsuit—Trials.**

   Where a conveyance, purporting upon its face to have been signed by the proper officers of a corporation, is introduced in evidence with the corporate seal attached, the affixing of the seal is prima facie evidence, though not conclusive, that it had been signed by the persons in the capacity designated; and when the validity of the conveyance is attacked upon the ground that the persons whose names appear thereon are not the proper officers, a judgment as of nonsuit is improvidently allowed, especially, as in this case, when there is other evidence tending to show that the proper officers of the corporation had signed as indicated and recited in the conveyance.

2. **Evidence—Demurrer—Deeds and Conveyances—Appeal and Error—Dependent Rights.**

   Where the rights of defendant judgment creditors of a defendant corporation are dependent upon the validity of the execution of the conveyance of the corporation's land to the plaintiff, and on this point defendant's demurrer to the evidence has been erroneously sustained, the case will be reinstated as to all defendants.

APPEAL by plaintiff from *Kerr, J.*, at October Term, 1922, of DARE.

This was an action to recover damages against the defendant Dare Lumber Company for breach of contract, and further seeking as to the other defendants, the Metropolitan Life Insurance Company and the Metropolitan Trust Company to have the judgment therefor declared a prior lien upon the property of the Dare Lumber Company over any lien claimed by said last two defendants by reason of an alleged deed in trust executed by the Dare Lumber Company to them to secure certain bonds.

The plaintiff alleges that it made a written contract with the Dare Lumber Company 18 August, 1919. The plaintiff contends that this contract was made in good faith and valid, and said company, through its receiver and officers, made preparations to carry out said contract, as it was able to do, but subsequently committed a breach thereof, and plaintiff was ready and willing at all times to perform its part of said contract. It demanded judgment against the Dare Lumber Company for damages, and that any judgment which might be recovered against the same should have priority over any alleged lien claimed by the Metropolitan Life Insurance Company arising out of the deed and trust thereto.

The trial judge being of the opinion that no evidence had been offered tending to show the execution of the contract, entered a judgment of nonsuit, and plaintiff appealed.

Aydlett & Simpson, Conlen, Acker, Manning & Brown, and Small, MacLean & Rodman for plaintiff.

J. C. B. Ehringhaus for Dare Lumber Company.

Frank Ewing, W. A. Worth, and Meekins & McMullan for defendants Metropolitan Trust Company and Metropolitan Life Insurance Company.

CLARK, C. J. This is an appeal by plaintiff from a judgment of nonsuit at the close of its testimony. The action was brought against the Dare Lumber Company, alleging that on or about 18 August, 1919, the plaintiff entered into a certain contract in writing, a copy of which is marked Exhibit "A," and attached to the complaint; that the plaintiff was ready, able, and willing to perform, but that defendant Dare Lumber Company breached said contract and asked judgment for damages. There were additional allegations in regard to the other defendants.

The Dare Lumber Company, in its answer, while admitting the signatures of Williams and Moloney to said instrument, specifically denies that they were officers of the Dare Lumber Company at the time of signing, and also denies that they or the receiver McCall were authorized to execute such paper for and in behalf of said company.

The witness M. G. Wright testified that George V. S. Williams was the secretary of the Dare Lumber Company; that he saw Williams sign the paper and put the corporation seal on it; that Williams carried it into a room on the door of which was Moloney's name, and he came out with the paper signed as recited therein.

Exhibit "A" is a copy of the agreement in question, and at the bottom there is this recital: "In witness whereof, the parties hereto, by their proper officers, have hereunto set their hands and seals, the day and year above written. Dare Lumber Company, by William R. Moloney, President. (Seal.) Attest: George V. S. Williams, Secretary. Henrico Lumber Company, Inc., by Eugene W. Fry, President. (Seal.) Attest: Melville G. Wright, Secretary.

In the fourth section of the complaint the plaintiff alleged the execution of the contract in writing, a copy of which was attached marked Exhibit "A," and introduced a portion of the fourth section of the defendant company's answer as follows: "That on or about 18 August, 1919, as it is informed and believes, a paper-writing substantially in the form of Exhibit "A" was signed by the parties, whose signatures were thereto appended."

An instrument is admissible without proof by attesting witnesses where its authenticity is admitted in the pleadings of the party to be charged therewith. 22 C. J., 937; *Jones v. Henry,* 84 N. C., 320; *Smith v. Gale,* 144 U. S., 509.

In unattested instruments any competent proof of execution is admissible. A deed with no subscribing witnesses may be proved by the handwriting of the grantor. *Black v. Justice,* 86 N. C., 504. "Although reasonable certainty in proof of the genuineness and authenticity of an instrument offered in evidence should be required, it is not necessary that proof be conclusive, but a prima facie showing that the instrument is genuine and authentic is sufficient to warrant its reception." 22 C. J., 934, sec. 1161; *Watson v. R. R.,* 164 N. C., 176. If there be any evidence tending to show the execution of the instrument, it is proper for the court to submit it to the jury, and they alone are to decide upon the weight of the testimony.

The fact that the common seal of a corporation is affixed to an instrument is prima facie evidence that it was so affixed by proper authority. *Clark v. Hodge,* 116 N. C., 763. In this case additional evidence bearing upon the execution of the contract was shown by M. G. Wright, who testified that George V. S. Williams was the secretary of the Dare Lumber Company; that his signature to the contract was genuine; that he affixed the seal of the corporation with the name of Moloney signed thereto.

In sections 3, 4, and 5 of their answer, the Dare Lumber Company admitted the execution of the contract, and admitted that McCall, the receiver, controlled the elections; that he elected the officers; that the parties whose names are signed to Exhibit "A" executed said contract, and, also, that the defendant Dare Lumber Company partially performed the contract. We think that there was evidence sufficient to be submitted to the jury on the authenticity of the contract, and that the judgment of nonsuit should be reversed.

As the right of action against the other defendants was dependent upon the admission of the contract alleged to have been executed by the Dare Lumber Company, the nonsuit cut off the tap-root, and the case should be reinstated as to them as well as in regard to the Dare Lumber Company.

The judgment of nonsuit must be set aside as to all the defendants.

Reversed.

CITY OF DURHAM v. SOUTHERN RAILWAY COMPANY, NORFOLK AND WESTERN RAILROAD COMPANY, AND SEABOARD AIR LINE RAILROAD COMPANY.

(Filed 4 April, 1923.)

1. **Mandamus—Municipal Corporations—Cities and Towns—Railroads—Crossings.**

   Mandamus is the proper remedy for a city to compel a railroad company to observe its ordinance requiring a change from a grade crossing to an underpass of the railroad track with the city streets for the safety of the citizens.

2. **Same—Courts—Chambers—Issues—Questions for Jury—Statutes.**

   Under the provisions of C. S., 868, a summons to compel a railroad company to observe a city ordinance requiring it to change its grade crossing with a street to underpass, etc., is returnable before the judge either at chambers or in term, and upon good cause shown he is to determine the facts as well as the law, except where controlling issues of fact are raised, when upon motion of either party it is his duty to continue the action until the issues can be determined by the jury at the next regular term of the court.

3. **Same—Evidence—Ordinances—Burden of Proof.**

   Where, after an investigation of the conditions at a grade crossing of railroad tracks with a city street, the city has determined that the crossing is a menace to the life, etc., of its citizens, and has passed an ordinance requiring the railroad company to put in an underpass to remedy the conditions, and has proceeded by *mandamus* to compel the railroad company to comply with the ordinance, the introduction of the ordinance at the hearing is prima facie evidence of the necessity thereof, casting the burden upon the railroad company to show that the ordinance was unreasonable or oppressive.

4. **Same—Pleadings—Questions for Court.**

   When the answer and affidavits of a railroad company in *mandamus* proceedings by a city to enforce its ordinance requiring the railroad to change from a grade crossing with its street to an underpass, raises only evidentiary matters on the controlling issues, or as to the extent of the dangerous conditions requiring the change, no issues are raised requiring the intervention of the jury, and the judge before whom the proceedings are returnable will determine the matter. C. S., 868.

5. **Municipal Corporations—Cities and Towns—Police Powers—Public Safety—Corporation Commission—Statutes.**

   A city has both inherent and authority by general statute over its streets for the protection of its citizens, which is not taken from it by C. S., 1048, conferring like powers upon the Corporation Commission.

6. **Municipal Corporations—Cities and Towns—Public Safety—Charter Powers.**

   A city charter giving a city specific authority to erect gates at a railroad crossing, or to require the railroad company to place a flagman there to warn pedestrians, with provision that such authority shall not be exclu-

sive, does not limit the authority of the city therein, or take from it the inherent and statutory right to require that the railroad company construct an underpass for the protection of the public.

7. Constitutional Law—Police Powers—Federal Statutes—Municipal Corporations—Cities and Towns.

The exercise by the State of its power to provide for the safety of its citizens with respect to grade crossings of its street by a railroad company is within its police powers, and may be exercised by municipal corporations under authority conferred on them, and not being delegated to the National Government, it is not affected by Federal legislation upon interstate commerce or the Federal Transportation Act.

APPEAL by defendants from an order for a *mandamus* made by *Connor, J.*, at chambers in Durham, 16 September, 1922.

The plaintiff made application for mandamus to compel the railroad companies to eliminate the grade crossing on Chapel Hill Street over the railway tracks of the defendants, and to build an underpass under said tracks. Chapel Hill Street is one of the main streets for traffic in said city, connecting the northern and southern portions of the city and leading from Durham to Chapel Hill. The three defendant railroads have tracks crossing that street on a grade on which are operated both passenger and freight cars. It is alleged and not denied that in a radius of approximately 800 yards of this Chapel Hill Street grade crossing are located the freight depots of all three defendants, large tobacco plants and factories, ice and power plants, flour mills, hosiery mills, all of which depots and industries are served with side or spur tracks connected with the main line tracks of the defendants over which are operated constantly, during day and night, passenger trains, freight trains, and switching engines.

In paragraph 5 it is alleged that several accidents have occurred at this grade crossing in which people, animals, and vehicles have been injured.

In paragraph 6 it is alleged that the governing authorities of the city of Durham, finding that the continued maintenance of said grade crossing is a great inconvenience to the whole people, seriously interrupting and impeding street traffic, and is dangerous to public travel, employed an expert consulting engineer to advise said governing authorities of the said city if it were practicable and feasible to change or alter said grade crossing in order that the same might be made safe and convenient for the traveling public, and that said engineer, after full investigation, recommended that said grade crossing could best be made safe by separating the street and railroad grades and passing the street underneath the railroad tracks by means of an underpass, and that the said city council invited the defendant to have their representatives meet with it and its representatives with the view of having said defendants remedy

said grade crossing by the building of an underpass in the place thereof. And that many conferences were held by and between engineers of the city and the defendant companies which resulted in no definite or satisfactory agreement.

In paragraph 7 of the complaint it is alleged that on 20 March, 1922, the city council, the governing authorities of the city of Durham, adopted an ordinance which, after reciting the above facts, directed that the grade crossing should be eliminated by the construction of an underpass for the street, and directing the defendant railroad companies to eliminate said grade crossing and construct the underpass with proper approaches, fixing the width and height of the underpass and its method of construction, and also directing that the said work be begun within 60 days and completed within 280 working days thereafter, and that a copy of said ordinance was duly served upon the said defendant railroad companies.

In paragraph 8 of the complaint it is alleged that the city caused to be made a record of the street traffic along and over said street and over said grade crossing, which record is attached to the exhibits to the complaint, showing an average of nearly 4,000 pedestrians and bicycles had crossed this grade crossing a day; over 500 horse-drawn vehicles, and more than 2,000 passenger automobiles, more than 350 delivery wagons, over 100 heavy trucks, and over 200 street cars; and that there were more 100 times during the same hours, to wit: from 5 o'clock in the morning until 11 o'clock at night, the trains and switch engines crossing Chapel Hill Street blocked the crossing between those hours a total obstruction of 1¾ hours per day.

The railroad companies answered, admitting the averments above recited with the qualification that they did not at *all times* of day and night move the trains over said crossing, and they denied that the crossing at Chapel Hill Street was blocked to the extent alleged in the complaint, and also, in a separate defense, alleged that an overhead bridge would be more economical to construct than an underpass; that the requirement of the building of an underpass was unreasonable and oppressive, and a burden upon interstate commerce, and not permitted by the Transportation Act of Congress, and that the ordinance of the city of Durham was arbitrary and not due process of law, was a violation of the commerce clause of the Constitution, and that the jurisdiction to require the raising or lowering of the tracks at a highway crossing was exclusively with the Corporation Commission of the State of North Carolina.

The railroad companies also moved that the action be continued, and no order be made therein until the issues of fact raised could be decided by a jury at a regular term of the Superior Court of Durham County.

The court overruled the motion, and defendants excepted. From the judgment granting a *mandamus,* the defendants also excepted and appealed.

S. C. Chambers, J. S. Manning, and W. J. Brogden for plaintiff.

Fuller & Fuller, W. B. Guthrie, Manly, Hendren & Womble, L. E. Jeffries, Theodore W. Reath, and James F. Wright for defendants:

CLARK, C. J. The refusal by the court of the motion to continue the hearing and transfer the case to the civil issue docket of the Superior Court for trial by jury was not erroneous, for no issues of fact are raised by the answer. The defendants rely upon C. S., 868, but the relief sought by the plaintiffs is not for the enforcement of a money demand, and that section authorizes the summons to be returnable before the judge at chambers not less than ten days after service of summons in the complaint, "at which time the court, except for good cause shown, should hear and determine the action both as to law and fact. However, when an issue of fact is raised by the pleading, it is the duty of the court upon the motion of either party to continue the action until the issue of fact can be decided by jury at the next regular term of the court." The contention of the defendants is that the answer raised issues of fact because they qualified their admission of the truth of the averment in paragraph 4 as to the volume of the traffic over this grade crossing to the extent averred in paragraphs 4 and 8 of the complaint; but neither of these denials raised an issue of fact. Neither did the assertion in the answer that the underpass would be more expensive than a bridge, and therefore that the action of the governing authorities of the city of Durham was arbitrary, unreasonable, and oppressive. These defenses raised no issues of fact to be tried by jury, and the latter was a question of fact for the court.

In *Lee v. Waynesville,* 184 N. C., 565, it was held that the courts will not interfere with the statutory discretionary powers given to the governing authorities of an incorporated town to take land from adjoining owners in widening its streets for the public welfare unless their action in doing so is so unreasonable as to amount to an oppressive and manifest abuse of the exercise of this discretion under C. S., 2791, 2792, citing numerous cases.

It is admitted in this case that this Chapel Hill Street is one of the main streets and most important thoroughfares in the city of Durham, connecting, as it does, the northern and southern sections of the city, and is the thoroughfare leading from Durham to Chapel Hill. It is traversed by thousands of people daily, and the question whether or not the public safety demanded elimination of the grade crossing was one in the

legislative power of the governing authorities of the city of Durham, and their decision is conclusive and final, unless it was shown that it is clearly oppressive or amounts to abuse of their discretion. The denial as to the number of times a day the crossing was broken by passenger and freight trains or switch engines, and of the exact number of pedestrians, bicycles, automobiles and other vehicles crossing per day is clearly a mere evidentiary matter, and does not constitute issues of fact in view of the admission that Chapel Hill Street is one of the main streets or thoroughfares in said city, over which so large a volume of traffic and travel passes every day. This Court has repeatedly held that mere evidentiary matters do not raise issues of fact. This is clearly stated in *Edgerton v. Kirby,* 156 N. C., 347, and also in *Jackson v. Tel. Co.,* 139 N. C., 347, in which the Court said: "We do not approve of issues which, as in this case, embody evidentiary facts instead of the ultimate facts to be found by the jury, and which are, therefore, the only issuable facts. *Grant v. Bell,* 87 N. C., 34; *Patton v. R. R.,* 96 N. C., 455."

The city made out a prima facie case when it showed the enactment and passage of the ordinance, which was admitted by the three railroads. The judge properly held that a presumption existed in favor of the validity of the ordinance, and the burden was upon the railroads to show otherwise, which they declined to do. The judge was ready to hear and determine the action, but the railroads failed to offer testimony or evidence of any kind whatever. It did not devolve upon the city to prove that the crossing was blocked on the dates mentioned to the exact extent as alleged in the complaint, as the burden of proving the ordinance invalid or unreasonable was on the defendants either by showing that in fact the railroads did not block the crossing; that traffic was not impeded, and that the crossing is not dangerous. That the governing body exceeded its powers, or committed fraud and oppression, constituting a manifest abuse of discretion are questions of law for the court. The burden is upon the defendants to show affirmatively that there was an abuse of discretion and that the ordinance was unreasonable and oppressive. The reasonableness of a city ordinance is a question of law for the court. *Crotts v. Winston-Salem,* 170 N. C., 27; *Small v. Edenton,* 146 N. C., 527; *Tate v. Greensboro,* 114 N. C., 399. There must be sufficient facts alleged to show that the ordinance is unreasonable and oppressive before it can become an issue of fact for the jury.

The defendants contend, however, that by reason of the enumeration of certain powers in the city charter, among others, "To require railroad companies to erect gates at crossings or to place flagmen to warn the public of the approach of trains," restricted the city's right to exercise only the powers specifically mentioned, and that C. S., 1048, confers upon the Corporation Commission sole jurisdiction over the subject-matter of

this controversy. But the last paragraph of section 48 of the city charter recites that the powers enumerated therein "shall not be held or deemed to be exclusive"; that it shall have all the powers conferred by the several statutes applicable.

This question, which is the one most relied upon by the defendants in this cause, was fully settled in *R. R. v. Goldsboro,* 155 N. C., 362, where this Court said: "The plaintiff earnestly contends that inasmuch as Rev., 1097 (10) (now C. S., 1048), authorized the Corporation Commission to require the raising or lowering by a railroad of its track or highway at any crossing, and to designate who shall pay for the same, this deprives the city of Goldsboro of the right to exercise its police power in that regard. The provision just cited giving the Corporation Commission the power stated is not in derogation of that conferred in the charters of towns and cities, but is supplementary merely." In that case, *R. R. v. Goldsboro, supra,* the exact point is so fully and clearly discussed with citations of Federal decisions and decisions from other states that it is unnecessary to repeat what is there said.

Our decision in that case was affirmed on a writ of error, *R. R. v. Goldsboro,* 232 U. S., 548, and in the citations at the end of that opinion in the Anno. Ed.

Since that volume was annotated, the case has since been reaffirmed in *Borden v. R. R.,* 175 N. C., 179; *Powell v. R. R.* (*Hoke, J.*), 178 N. C., 245; *In re Utilities Co.,* 179 N. C., 159, 160; *Goff v. R. R., ibid,* 224; *Raleigh v. Power Co.* (*Brown, J.*), 180 N. C., 237; *Durham v. Public Service Co.,* 182 N. C., 338.

The findings of fact by the city in the exercise of its legislative and police powers make out a prima facie case, and the railroads failed to offer any testimony or evidence to show abuse of discretion or unreasonableness. Only two questions can arise: (1) Did the city possess the power to enact the ordinance? (2) Is the ordinance a reasonable exercise of the power?

Full power has been conferred upon the governing body of the city to enact such ordinances as are necessary to promote and safeguard the health, safety, and general welfare of the public. Besides the powers expressly given in the charter, the city possesses the powers conferred by Laws 1917, ch. 136, and the last paragraph of section 48 of the charter of Durham, Private Laws 1921, ch. 42, reads as follows: "The enumeration of particular powers by this charter shall not be held or deemed to be exclusive, but in addition to the powers enumerated or implied herein, the city of Durham, either through its city council or through such other officers as may be provided, shall have and may exercise all other powers which under the Constitution and laws of North Carolina now are or hereafter may be granted to cities."

The city having exclusive control of its streets, the question in the first instance was one for the local authorities. McQuillan—7 Municipal Corporations, sec. 955.

In *St. Paul v. R. R.*, L. R. A., 1917 C, 1174, the Court said: "The determination that public necessity requires a separation of crossing grades and the method of accomplishing it, is in the first instance a legislative act for the common council"; and further, "The separation of grades may be effected either by compelling the railroad to depress its tracks and carry the street over them, or by compelling it to carry the street over or under the crossing grade of the railroad, as reasonable public necessity may require."

The ordinance in this case was enacted under an exercise of the police power and authority conferred in the charter and the several statutes applicable.

In *Powell v. R. R.*, 178 N. C., 245, this Court said: "The right of the city government, both under its police powers and the several statutes applicable, to require railroads to construct bridges along streets running over their tracks, is fully established in this jurisdiction, and is recognized in well considered cases elsewhere."

In *Minneapolis v. R. R.*, 28 L. R. A. (N. S.), 306, the Court said: "The tendency of modern development is in the direction of greater, rather than more restricted, use of police power, and necessarily so in order to meet the new dangers, and increase of old dangers, constantly occurring as natural incidents of advancing civilization. We think the weight of modern authority is in accord with the views just expressed, and to the effect that everything that goes to make a crossing safe for public use is as essentially within police regulations as any part of it." This was cited in *R. R. v. Goldsboro*, 155 N. C., at p. 360 (affirmed on writ of error, U. S. Supreme Court, 232 U. S.).

R. R. v. Goldsboro, supra, was cited with approval in *R. R. v. Omaha*, 235 U. S., 121, where it is held: "A railway company may, consistently with due process of law, be required by the State, or by a duly authorized municipality acting under its authority, to construct overhead crossings or viaducts at its own expense, the consequent cost to the company being as a matter of law *damnum absque injuria*, are deemed to be compensated by the public benefit which the company is supposed to share. . . . The necessity of the viaduct and the manner of its construction were primarily vested in the discretion of the city authorities . . ."

In *R. R. v. Minneapolis*, 115 Minn., 460, Ann. Case., 1912-D, 1029, the Court says: "The general rule so established is that where the safety, convenience, or welfare of the public require that a railway company carry its tracks over a public way, or the public way over its tracks, by a bridge, the uncompensated duty of providing such bridge devolves

upon the railway company. The basis of this rule is the superior nature of the public right inherent in the reserved police power of the State. A railroad, though constructed first in time, is constructed subject to the implied right of the State to lay out and open new highways crossing its right of way. If the operation of the railway upon a particular surface, or with a particular form of support for its tracks, interferes with the public safety, convenience, or welfare in the exercise of the public right to the use of such highway, then upon the railway company is placed the burden of making such necessary and reasonable adjustment of its tracks as will permit the exercise of the superior public right."

The Supreme Court of the United States, in affirming *R. R. v. Goldsboro,* 232 U. S., 430, says: "It is well settled that railroad corporations may be required at their own expense, not only to abolish existing grade crossings, but also to build and maintain suitable bridges or viaducts to carry highways, newly laid out, over their tracks, or to carry their tracks over such highways."

In the recent case of *R. R. v. Utility Comrs.,* 254 U. S., 394, *Mr. Justice Holmes,* speaking for the Court, says: "Grade crossings call for a necessary adjustment of two conflicting interests—that of the public using the streets and that of the railroads and the public using them. Generically the streets represent the more important interest of the two. There can be no doubt that they did when these railroads were laid out, or that the advent of automobiles has given them an additional claim to consideration. They always are the necessity of the whole public, which the railroads, vital as they are, hardly can be called to the same extent. Being places to which the public is invited, and that it necessarily frequents, the State, in care of which this interest is, and from which ultimately the railroads derive their right to occupy the land, has a constitutional right to insist that they shall not be made dangerous to the public, whatever may be the cost to the parties introducing the danger. That is one of the most obvious cases of the police power, or to put in the same proposition in another form, the authority of the railroad to project their moving masses across thoroughfares must be taken to be subject to the implied limitation that it may be cut down whenever and so far as the safety of the public requires. It is said that if the same requirement were made for the other grade crossing of the road it would soon be bankrupt. That the states might be so foolish as to kill a goose that lays golden eggs for them has no bearing on their constitutional rights. If it reasonably can be said that safety requires the change it is for them to say whether they will insist upon it, and neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil."

As held in *Superior v. Roemer,* 154 Wis., 250, a railroad company is bound by the rules of common law to build, at its own expense, a viaduct necessitated by the construction of its railroad across an existing highway, and a city, in the authorized exercise of the police power, may require a railroad company to construct the necessary viaduct: "Whenever it is reasonably necessary for the convenience and safety of the traveling public, it is the duty of a railroad company to viaduct or bridge its tracks at their intersection with streets. This duty exists at common law." *S. v. R. R. Co.,* 122 Minn., 280.

In *R. R. v. Railroad Commission,* 176 Ind., 428, which was a suit to compel the railroad company to separate a grade crossing by constructing the highway under the grade of the railroad, the Court said: "It is well settled in this State that the right of a railroad company to cross a highway with its tracks carries with it the duty on the part of the company to restore the highway to and keep it in its former condition of usefulness and safety, and if this cannot be done by a grade crossing, the company must do it either by constructing its tracks over or under the highway, or the highway over or under its tracks."

In *R. R. v. State,* 158 Ind., 189, the Court held that when a grade crossing as constructed by a railroad company is dangerous to life and property, and interferes with the free use of the highway, the railroad company may be compelled to construct a crossing under the railroad, if that is necessary to afford security to life and property, and to place the highway in such condition as not unnecessarily to impair its usefulness, or interfere with the free use thereof, as required by law.

In *R. R. v. Hopkins County,* 153 Ky., 718, the Court held that a railroad company may be required to carry its own tracks over a highway by means of a bridge, and that this rule applied to all cases where public safety, convenience, or public welfare required such bridge.

In *Denver v. R. R.,* 20 Colo., 186, it was conceded that a state or duly authorized municipality, has power to compel a railroad company to construct a viaduct along a street over its tracks, provided there is reasonable public necessity therefor.

In *People v. R. R.,* 149 N. Y. Supp., 315, the Court says: "That the State has a right to compel a railroad company at its own expense to eliminate crossings at grade by a depression of its tracks and the erection of bridges to carry streets over its right of way is too well recognized to admit of discussion."

The State, in the exercise of the police power, may authorize a city to require a railroad company to construct at its own expense such viaducts over its tracks at street crossings as may be necessary for the safety and protection of the public. *Omaha v. R. R.,* 94 Neb., 556.

In *Chattanooga v. R. R.,* 128 Tenn., 399, the Court held that under the common law a city could require a railroad to construct and maintain at its expense a proper bridge at a street crossing over its tracks, and stated that it was so held in 1859 in *R. R. v. State,* 3 Head (Tenn.), 523, and in *Dyer Co. v. R. R.,* 87 Tenn., 712.

The defendants having failed to comply with the terms of the ordinance, *mandamus* was the proper remedy to pursue. "Where it is the duty of a railroad company to construct a viaduct or bridge over its tracks, it may be compelled to do so by *mandamus.* This duty may exist and be enforced by *mandamus,* even though there is no express provision in the charter or statute in regard to the erection of viaducts or bridges. It may arise out of, or be embraced in the duty to restore and keep the highway in repair. Thus, in a leading case, it appeared that the railroad company's charter empowered the company to lay its tracks across any public highway or street, in such condition or state of repair as not to impair or interfere with its free and proper use. It was held that this was a continuing duty, and although the crossing might have been adequate when constructed, yet, by reason of the increase of business of the railroad, or of travel upon the street, the crossing became dangerous, or obstructed such travel, the company was bound to provide some other mode of crossing; and as it appeared that the only safe and convenient mode was to carry the street by viaduct under the tracks it was further held that the *mandamus* would lie to compel the railroad to construct such viaduct, including the abutments and approaches as well as the bridge for the tracks." Elliott on Railroads, vol. 3, sec. 1111.

Appellants contend that the ordinance is void for that compliance with same would not be that efficient and economical management and a reasonable expenditure for structures by the carriers as required by subdivision 2, section 15a of the Interstate Commerce Act, as amended by the Transportation Act. But nothing in the Interstate Commerce Act or the Transportation Act contravenes the right of the State to invoke the supreme law—an inherent right—to legislate in the interest of public safety.

In *Glenn v. Express Co.,* 170 N. C., 293, *Justice Allen* quotes from *Sherlock v. Alling,* 93 U. S., 99, approved in *Plumly v. Mass.,* 155 U. S., 473, as follows: "In conferring upon Congress the regulation of commerce, it was never intended to cut the states off from legislating on all subjects relating to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country." Continuing, *Justice Allen* said: "The police power is one originally and always belonging to the states, and was not surrendered by them to the general Government."

As *Justice Holmes* said in *R. R. v. Comrs.*, 254 U. S., 410: "To engage in interstate commerce, the railroad must get on the land; and, to get on to it, must comply with the conditions imposed by the state for the safety of its citizens."

Affirmed.

M. F. BUTLER v. HOLT-WILLIAMSON MANUFACTURING COMPANY.

(Filed 4 April, 1923.)

1. False Arrest—Imprisonment—Evidence—Nonsuit—Malice.

In an action to recover damages for false arrest and imprisonment, liability of the defendant arises from an arrest without proper authority, or such abuse of authority that the protection ordinarily afforded by it is withdrawn; and while evidence of malice, in the sense of personal ill-will, may be received on the trial, especially as it may relate to the issue of damages, it is not a determinative element or one necessary to raise an issue to be determined by the jury; and defendant's motion to nonsuit upon the theory that malice was required to be shown is properly refused.

2. Appeal and Error—Instructions—Harmless Error.

Where the trial has proceeded upon the theory that in actions for false arrest and imprisonment it is necessary for a recovery to show malice on defendant's part, and an issue has been submitted to the jury to that effect, an instruction requiring the plaintiff to show the affirmative of the issue is in defendant's favor and cannot be held for reversible error on his appeal.

3. False Arrest — Imprisonment—Evidence—Witnesses—Cross-examination—Prejudice—Damages—Appeal and Error.

Where, upon the trial to recover damages in an action for false arrest and imprisonment, the defendant has testified upon the issue of his damages that in consequence he was so injured in character and reputation that he could not hold positions for which his training had fitted him, it is reversible error for the court to exclude testimony in defendant's behalf, tending to show that plaintiff's changes of positions were voluntary on his part, and not caused by the false arrest, etc., and this though the evidence tending to show loss of positions, etc., had been brought out on defendant's cross-examination of plaintiff. The range of cross-examination of a witness to the extent to which a party may contradict his own or the witness of opposing party discussed by HOKE, J.

4. False Arrest—Imprisonment—Principal and Agent—Night Watchman—Police—Damages.

Where, in an action of false arrest and imprisonment the defendant is alleged to have acted through its employee, a night watchman or special policeman on its manufacturing premises, the question of the principal's liability, depends upon whether the agent wrongfully, etc., caused the plaintiff's arrest while acting within the scope of his duties on defendant's premises, if such restriction be established.

APPEAL by defendant from *Bond, J.*, and a jury, at October Term, 1922, of CUMBERLAND.

The action is to recover damages for false arrest and imprisonment of plaintiff by one Edward Mazingo, the night watchman of defendant mills, whereby plaintiff was subjected to physical and mental pain and suffering and humiliation, etc., and plaintiff was greatly compromised and injured in his credit and circumstances, etc.

There was denial of any arrest or imprisonment, defendant contending that if any such arrest was made by their night watchman he was acting at the time entirely out of the scope of his duties and authority as employee of defendant.

On issues submitted, the jury rendered the following verdict:

"1. Was the plaintiff Butler prosecuted, arrested, and imprisoned by and at the instance of Edward Mazingo? Answer: 'Yes.'

"2. Was Ed. Mazingo, in prosecuting, arresting, and having plaintiff Butler imprisoned acting as the agent of defendant Holt-Williamson Manufacturing Company, and within the scope of his employment? Answer: 'Yes.'

"3. Was said prosecution, arrest, and imprisonment wrongful and without probable cause? Answer: 'Yes.'

"4. Was said prosecution, arrest, and imprisonment malicious? Answer: 'Yes.'

"5. What damages, if any, is plaintiff Butler entitled to recover of defendant Holt-Williamson Manufacturing Company? Answer: '$900.'"

Judgment on the verdict for plaintiff, and defendant excepted and appealed.

W. C. Downing and Bullard & Stringfield for plaintiff.
Oates & Herring and Dye & Clark for defendant.

HOKE, J. This cause was before us on a former appeal, and will be found reported in 182 N. C., 547, where a clear and comprehensive statement of the pertinent facts is given in the opinion by *Associate Justice Adams*. In that case a new trial was ordered for defendant on the ground chiefly that his Honor had not sufficiently or properly adverted to certain evidence introduced by the company tending to show that in making the alleged arrest the night watchman had acted beyond the scope of the duties and authority conferred or incumbent upon him as defendant's employee. In that case it was ruled, however, in effect, that there was evidence tending to establish plaintiff's position on the principal issues of liability and the cause was remanded for retrial in that aspect of the matter. The evidence on these issues is substantially the

same in the present record, and the motion for nonsuit made by defendant was properly disallowed.

Defendant, however, insists further on this motion for nonsuit, contending that there was no evidence of malice as presented in the fourth issue, the judge having charged that there could be no recovery unless there was verdict for plaintiff on this issue. This would have been a correct charge in a suit for malicious prosecution, and the case seems to have been tried in part on that theory, but this is not a suit for malicious prosecution, and there is doubt if on the evidence liability would attach against defendant company in such an action. See *Daniel v. R. R.*, 136 N. C., 517. Plaintiff's action is for false arrest and imprisonment, and his complaint, no doubt intentionally, is restricted to this, and in actions of this kind liability arises from an arrest without proper authority, or such an abuse of authority that the protection ordinarily afforded by it is withdrawn. But while malice in the sense of personal ill-will may be pertinent to the inquiry in such an action, more especially on the question of damages, it is, as stated, not always essential to liability, and a motion for nonsuit can only be sustained when there is a failure of proper proof on the issues which are determinative.

We must not be understood as holding that there is no evidence in the record justifying the verdict on this issue, and the charge of his Honor, while erroneous, may not in itself be held for reversible error because the error is in appellant's favor, but for the reasons stated, the judgment of his Honor below denying defendant's motion for nonsuit must in any event be upheld.

While we approve the proceedings below in this motion for nonsuit, we are of opinion that there has been reversible error to defendant's prejudice in excluding the evidence offered of the witness J. D. Wadkins, record, p. 34. Plaintiff, as stated, brings his action for false arrest and imprisonment at the instance of defendant, whereby, among other grievances, he was greatly humiliated and compromised in his credit and standing, etc., and taking the witness stand in his own behalf he testified very fully to the transaction complained of. On cross-examination, and with a view, no doubt, of showing that the injury was not so great as claimed, counsel had asked witness if one or more changes of employment made by him since the arrest had not been voluntary on his own part. He stated, in effect, that one or more of them were, but he supposed he was discharged from the Puritan or Holt Morgan Mill (owned by a brother of defendant's proprietor) on account of this trouble. That the boss, J. D. Wadkins, who had charge of the matter, had told him they intended to do it the following week, whereupon witness had asked for his time at pay-day the Saturday preceding.

Defendant, in reply to this evidence, proposed to examine the witness Wadkins to the effect that plaintiff was not discharged from the Puritan Mill, but left voluntarily because they could not furnish a house large enough for his family, he having six or seven children, and that nothing was ever said between them as to his being discharged, etc. This testimony was directly within the line of inquiry, as disclosed by the pleadings, was pertinent, and may have been very important on the question of damages, and in our view should have been received. And the position is not affected because the relevancy of the evidence was only induced by reason of the cross-examination. A litigant is allowed to contradict his own witness, who has made unexpected statements to his hurt, or to show that such statements are untrue, and *a fortiori* should this privilege be given as to an opposing witness who has given prejudicial evidence against a litigant. The range that a cross-examination may take in this jurisdiction and this privilege of contradicting one's own witness, and the extent of it, is treated at some length by us in *Smith v. R. R.,* 147 N. C., 605, where it is said in part:

"We do not conclude, however, as claimed by defendant, that because this is true, the testimony of the witness must be taken as importing absolute verity, nor that the plaintiff is thereby precluded from insisting on any position which may contradict or in any way antagonize the statements made by his witness. While it is accepted doctrine that one who offers a witness 'presents him as worthy of belief,' and, except, perhaps, where an examination is required by the law, as in the cases of subscribing witnesses to wills and deeds (*Williams v. Walker,* 2 Rich. Eq., 294; 46 American Dec., 53), a party will not be allowed to disparage the character or impeach the veracity of his own witness, nor to ask questions or offer evidence which has only these purposes in view, it is always open to a litigant to show that the facts are otherwise than as testified to by his witness. *S. v. Mace,* 118 N. C., 1244; *Chester v. Wilhelm,* 111 N. C., 314. And this he may do, not only by the testimony of other witnesses, but from other statements of the same witness, and at times by the facts and attending circumstances of the occurrence itself, the *res gestæ. Becker v. Koch,* 104 N. Y., 394."

For the error indicated there must be a new trial of the cause, to the end that the same may be determined on issues appropriate to an action of arrest and false imprisonment as set forth in the pleadings. On such an inquiry the authorities are to the effect that if the defendant's night watchman, while acting within the scope and course of his duties as such employee, wrongfully caused the arrest and imprisonment of the plaintiff, liability on the part of defendant would not be prevented because the employee had been clothed with authority as special policeman for the purpose. On the other hand, if the night watchman at the time held

such authority, and for the purpose stated, the company would be entitled to have the issues considered and determined in reference to that fact, and he is only to be regarded and dealt with as defendant's employee, when acting within the scope of his duties as such and within the area designated if any such restriction is established.

In that aspect of the evidence, authorities helpful to a further trial of the cause will be found in: *Sigmon v. Shell,* 165 N. C., 582; *Ill. Steel Co. v. Novak,* 84 Ill. App., 641; *S. c.,* affirmed in 184 Ill., 501; *Park v. Felman et al.,* 130 N. Y. Supp., 361; 6th Sabatt on Master & Servant (2 ed.), sec. 2477 and 2480.

New trial.

ROBERTS & HOGE, INC., v. HUGH MOORE AND OTHERS. PARTNERS TRADING AS HUGH MOORE & BROTHERS.

(Filed 4 April, 1923.)

1. Venue—Actions—Statutes.

The venue of an action brought by a nonresident of the State in a different county herein from that where the defendants reside or do business, and wherein the defendant has no property, is an improper one. C. S., 459.

2. Same—Courts—Jurisdiction—Waiver.

The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from an improper to the proper county by failing to comply with the provisions of our State, C. S., 470, that before the expiration of the time for filing his answer he must demand in writing that the trial be conducted in the proper county.

3. Same—Clerks of Court—Appeal.

The power to entertain a demand of defendant to remove an action to the proper venue under the provisions of C. S., 470, is now conferred by a recent statute upon the clerk, subject to the right of appeal to the judge at the next term, when the motion shall be heard and passed upon *de novo.*

4. Same—Substantial Right.

Where defendant has made his motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon.

5. Same—Judgments.

When the defendant has proceeded by motion before the clerk to have plaintiff's action against him removed to the proper county for improper venue, and this before the time for filing his answer has expired, a judgment by default final for the want of an answer is entered contrary to the due course and practice of the courts, and on appeal to the Supreme

Court will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue.

6. Same—Motions—Notice.

When a judgment by default final has been entered against a defendant for the want of an answer, and it appears that the defendant had lodged his motion in apt time for a change of venue in accordance with the provisions of C. S., 470, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days notice of his motion, C. S., 912, before time for answering has expired, will not affect his right to have the judgment by default against him vacated.

7. Appeal and Error—Record—Facts Presumed.

Facts appearing upon the record and unchallenged in the argument are taken as true on this appeal by defendant seeking to set aside a judgment by default final, taken pending the hearing upon his motion for a change of venue under the provisions of C. S., 470.

APPEAL from judgment by default final, on certain promissory notes of defendant to plaintiff, entered against defendant in NEW HANOVER, on 15 December, 1922, before *Devin, J.*

There being indication from the transcript of record originally presented that said judgment by default had been entered after adjournment of the Superior Court, and hence out of term, in response to *instanter* writ or *certiori* from this Court, notice being waived by the parties, the clerk of said court certifies that December term of Superior Court had not adjourned at the time, and the judgment complained of was entered during said term.

From the facts presented in the record, or unchallenged on the argument before us, it appears that plaintiff is a foreign corporation doing business in Richmond, State of Virginia, and that the defendants, each and all of them are citizens and residents of the county of Sampson, doing business in that county, and were such at the time of action commenced, and have been since, and that neither of them do business or own property in New Hanover County. It further appears that the summons in the cause was issued from Superior Court of New Hanover County on 14 November, 1922, returnable before the clerk of said court on 24 November, 1922, the time for answering the complaint in the cause not expiring before 14 December, 1922. That on 12 December, 1922, defendant moved in writing before the clerk for a change of venue to the county of Sampson, supported by affidavit showing the citizenship and residence of the parties. That notice for such motion with copy of affidavit was issued and served on 12 December, and fixing time for hearing same before the clerk on 18 December, 1922. That within the time allowed by law, to wit, on the day of the rendition of the judgment, defendants duly entered their appeal from same, assigning for error, among other things, that the judge of the Superior Court was without

power to enter said judgment pending a motion for change of venue duly entered and before the clerk and undetermined at the time.

Wright & Stevens for plaintiff.
Faircloth & Fisher and Weeks & Cox for defendants.

HOKE, J. Under C. S., 469, if the facts embodied in the affidavit of defendants are true, and they were taken as true on the argument before us, the proper venue for the trial of this cause is in Sampson County. In this view of the record, C. S., 470, provides that if the county designated for that purpose in the summons and complaint is not the proper county, the action may, however, be tried therein unless the defendant, before the time for answering expires, demands in writing that the trial be conducted in the proper county, and the place of trial is thereupon changed by consent of parties or by order of the court. And in Public Laws 1921, Extra Session, ch. 92, sec. 1, subsec. 15, the power to entertain this motion for removal is conferred upon the clerk of the court, subject to the right of appeal to the judge at the next term, where the motion shall be heard and passed upon *de novo*.

While it is clear from a perusal of section 470 that this question of venue is not in the first instance jurisdictional, and may be waived by the parties, and the decisions construing the section so hold, these decisions are also to the effect that where the motion to remove is made in writing and in apt time, the question of removal then becomes a matter of substantial right, and the court of original venue is without power to proceed further in essential matters until the right of removal is considered and passed upon. And any such judgment entered before that should be set aside on motion or appeal as being contrary to the course and practice of the court. Assuredly so, then the material facts alleged in support of the motion to remove are practically admitted. *Brown v. Cogdell*, 136 N. C., 33; *Mfg. Co. v. Brower*, 105 N. C., 440; *Jones v. Statesville*, 97 N. C., 86.

And we are not impressed with plaintiff's position that the right of removal should not prevail in this instance, because the motion was not made till 12 December, the time to answer expiring on 14 December following. The statute provides that a defendant may make his motion at any time before the time for answering expires, and we find nothing to justify the Court in modifying this express provision of the law.

Plaintiff, as we understand the argument, rests his contention on the right of ten days notice, which he claims arises to him under C. S., 912. If it be conceded that plaintiff is entitled to such notice, this is by no means an absolute right, but the time may be lessened by special order, and if an order is made without notice, it is not set aside as a matter of

course. In any event, there is nothing in this provision which purports or should be allowed to affect the positive provision of the law directly appertaining to this right of removal, and which, as stated, expressly allows a defendant to make such motion at any time before the time for answering expires.

On the record, we are of opinion that the judgment by default final should be set aside and the cause remanded to the clerk to consider and pass upon defendant's motion for a change of venue. And if the facts are as they now appear, the cause should be removed to the county of Sampson, to be there proceeded with according to the course and practice of the court.

Judgment reversed.

AGNES SANDLIN v. CITY OF WILMINGTON.

(Filed 4 April, 1923.)

1. **Pleadings—Demurrer—Speaking Demurrer—Municipal Corporations—Cities and Towns—Statutes.**

   A demurrer only presents for the determination of the court questions of law upon the facts alleged in the former pleading taking them as true; and a demurrer that goes further, and makes allegation of matters in defense not theretofore alleged by the adverse party, is bad as a "speaking demurrer"; and when a city in its demurrer sets forth exemption from liability under a general or special statute, not referred to in the complaint, the provisions of these statutes will be disregarded in passing upon the demurrer.

2. **Municipal Corporations—Cities and Towns—Government Damages.**

   Municipal corporations are not civilly liable to individuals for failure to perform, or for negligence in performing, duties which are governmental in their nature, including, generally, such duties as are imposed upon them by law solely for the public benefit.

3. **Same—Trespass—Taking of Property—Due Process—Constitutional Law.**

   An action for damages against a municipality for trespass will not lie unless authority therefor is conferred by statute, or the injury to the property thus caused amounts to its appropriation by the city without due compensation.

4. **Same—Nuisance.**

   A municipal corporation is not authorized to maintain a nuisance, and an action will lie against it for damages to property resulting therefrom, regarded and dealt with as an appropriation of the property to the extent of the injury that he has thereby received.

5. **Municipal Corporations—Cities and Towns—Government—Damages.**

   An act of a municipality is governmental in its nature when it is done in the exercise of legislative, discretionary, or judicial powers conferred

thereon for the benefit of the public; but when the damages have resulted from the negligence or torts of their officers or agents in the exercise of powers conferred upon the municipality for its private advantage or profit, it is ordinarily liable to the individual therefor; as also for the negligent performance of duties by its officers or agents specifically imposed by private statute, or under the general law.

6. Same—Landlord and Tenant—Liens.

The lessee of lands may maintain an action against a municipal corporation to recover the damage his interest in the leased premises may have received from the defendant's maintaining a private nuisance thereon.

APPEAL by plaintiff from *Devin, J.*, at October Term, 1922, of NEW HANOVER.

From a judgment sustaining a demurrer to the complaint the plaintiff appealed.

J. Felton Head for plaintiff.
K. O. Burgwin for defendant.

ADAMS, J. The plaintiff alleges that she and her husband occupy a house and lot on Chestnut Street; that on the lot is an abandoned closet which has never been used by the plaintiff or by any member of her family or household; that a pipe connects the closet with the sewer in the street; that the sewer is of irregular or insufficient size, particularly at the place of its union with the pipe; that the defect in construction causes an overflow of sewage through the closet upon the lot and the consequent deposit thereon of refuse and noxious sediment; that such deposit not only causes vile and sickening odors, to the great discomfort, annoyance, and injury of the plaintiff, but causes damage to the yard and premises; and that the defendant permitted these conditions to continue after it had or should have had knowledge of the situation, and has refused and still refuses to abate the alleged nuisance.

The defendant demurred to the complaint on the following grounds: (1) There is no legal obligation on the part of the defendant to remedy the defects or to abate the nuisance referred to in the plaintiff's complaint; (2) the enactment of an ordinance or resolution to abate the nuisance alleged in the complaint is a governmental function, and the city is not civilly liable for failure to pass such resolution or ordinance, or if such resolution or ordinance had been passed, the defendant could not be civilly liable for failure to enforce the same, or to see that it was observed; (3) the defendant had no control over and could exercise no discretion in the things and matters set out in the complaint; (4) under Public Laws of 1913, ch. 66, there was created a county board of health for New Hanover County, and that said board of health was vested with full authority to enact rules and regulations for the preservation of

health, and to enforce the same, and the defendant had no control over or discretion in the same; (5) the cause of action set out in the complaint is to recover damages for the alleged illness of the plaintiff, and the defendant is not civilly liable for injury to the health of its citizens, and particularly of the plaintiff, growing out of and arising from the things and matters set out in the complaint; (6) Private Laws of 1907, sec. 18, ch. 241, provides that the defendant shall not be liable for damage caused by the negligent construction and maintenance of its sewers.

A demurrer admits the allegations of the preceding pleading, and puts to the test the question of their legal sufficiency; it raises an issue or issues of law upon the facts pleaded, but not a question of fact or an issue of fact; and when it invokes the aid of a fact which does not appear in the pleading demurred to, it is denominated a "speaking demurrer," and as such is insufficient. Therefore, we cannot consider the defendant's reference in the demurrer to the Public Laws of 1913 or the Private Laws of 1907. These matters may be pleaded in the answer by way of defense. *Von Glahn v. De Rossett,* 76 N. C., 292; *Moore v. Hobbs,* 77 N. C., 66; *Davison v. Gregory,* 132 N. C., 389; *Wood v. Kincaid,* 144 N. C., 393; *Wilcox v. R. R.,* 152 N. C., 317; *Besseliew v. Brown,* 177 N. C., 65; *Trust Co. v. Wilson,* 182 N. C., 166.

With the fourth and sixth sections eliminated, the demurrer still presents the question whether the complaint sets out a cause of action. The complaint must be given a liberal construction, for one of the objects of the Code system is to see that all actions shall be determined on their merits; and to that end every reasonable intendment and presumption is to be resolved in favor of the pleading. *Hoke v. Glenn,* 167 N. C., 594; *Womack v. Carter,* 160 N. C., 286; *Bank v. Duffy,* 156 N. C., 83; *Jones v. Henderson,* 147 N. C., 120; *Wood v. Kincaid, supra.* When we observe this principle and construe the pleadings with a view to substantial justice, as we are required to do, we find that the complaint charges the defendant with the creation and maintenance of a private nuisance on the premises occupied by the plaintiff; and if the defendant can be held liable to the plaintiff for damages caused by such nuisance the demurrer upon the admitted facts must be overruled. Let us see, then, by reference to former decisions whether the defendant's creation or maintenance of the alleged nuisance is actionable at law. From the various decisions of the Court relating to the duties and liabilities of municipal corporations these conclusions, we think, may fairly be drawn:

1. Such corporations are not civilly liable to individuals for failure to perform, or for negligence in performing, duties which are governmental in their nature, including generally such duties as are imposed upon them by law solely for the public benefit.

2. An action against a municipality for damages to property resulting from the performance of a governmental duty cannot be maintained on the theory of a trespass in the absence of statutory or legislative authority conferring such right of action, but this principle does not apply to an action brought to recover damages for property appropriated without due compensation.

3. A municipal corporation has no more right than an individual to maintain a nuisance, and is equally liable for damages resulting therefrom; and authorized acts of a governmental character which create a nuisance causing damage to a private owner are regarded and dealt with as an appropriation of property to the extent of the injury thereby inflicted.

4. An act is governmental in its nature when it is done in the exercise of the police power or in the exercise of legislative, discretionary, or judicial powers conferred upon a municipality for the benefit of the public.

5. When municipal corporations are acting in their corporate capacity or by virtue of powers exercised for their own advantage they are liable for damages caused by the negligence or torts of their officers or agents.

6. They are also liable in damages for the negligent performance by their officers and agents of duties which are specifically imposed by municipal charters or by special statutes. *Dayton v. Asheville, ante,* 12; *James v. Charlotte,* 183 N. C., 630; *Snider v. High Point,* 168 N. C., 608; *Lloyd v. Venable, ibid.,* 531; *Rhodes v. Durham,* 165 N. C., 679; *Hines v. Rocky Mount,* 162 N. C., 410; *Moser v. Burlington, ibid.,* 141; *Little v. Lenoir,* 151 N. C., 416; *Metz v. Asheville,* 150 N. C., 749; *Hull v. Roxboro,* 142 N. C., 453; *Fisher v. New Bern,* 140 N. C., 506; *Williams v. Greenville,* 130 N. C., 93; *Peterson v. Wilmington, ibid.,* 77; *Levin v. Burlington,* 129 N. C., 185; *McIlhenny v. Wilmington,* 127 N. C., 146; *Pritchard v. Comrs.,* 126 N. C., 908; *Coley v. Statesville,* 121 N. C., 301; *Willis v. New Bern,* 118 N. C., 133; *Russell v. Monroe,* 116 N. C., 721; *Shields v. Durham, ibid.,* 406; *Love v. Raleigh, ibid.,* 297; *Tate v. Greensboro,* 114 N. C., 393; *Moffitt v. Asheville,* 103 N. C., 237; *Hill v. Charlotte,* 72 N. C., 55.

The doctrine that a municipal corporation may be liable in damages for maintaining a private nuisance has frequently been sustained, and is generally adhered to in text-books and decisions. "Though a municipality or other body has power to construct and maintain a system of sewers, and although the work is one of great public benefit and necessity, nevertheless such public body is not justified in exercising its power in such a manner as to create, by a disposal of its sewage, a private nuisance, without making compensation for the injury inflicted, or being responsible in damages therefor, or liable to equitable restraint in a

proper case; nor can these public bodies exercise their powers in such a manner as to create a public nuisance, for the grant presumes a lawful exercise of the power conferred, and the authority to create a nuisance will not be inferred." Joyce on Nuisances, sec. 284. After citing this passage in *Little v. Lenoir, supra, Manning, J.,* remarked that this conclusion is sustained by the decisions of all the courts to whom the question had been presented. So on this point the appeal must be determined against the defendant's contention. *Moser v. Burlington, supra; Hines v. Rocky Mount, supra; Donnell v. Greensboro,* 164 N. C., 330; *Williams v. Greenville, supra.*

The defendant insists, however, that the object of the suit is the recovery of damages for the plaintiff's illness and not for any injury done to the property or to her interest, if any, therein, and that she is not entitled to damages for personal discomfort caused by the alleged nuisance; and this position is sustained by the decisions. It is true that in *Downs v. High Point,* 115 N. C., 182, damages for sickness were allowed, but to this extent that decision has been disapproved, and the rule for the measurement of damages has been stated in cases subsequently determined. *Moser v. Burlington, supra, p.* 144; *Rhodes v. Durham, supra; Hines v. Rocky Mount, supra,* pp. 413-414. But the plaintiff does not stop with an allegation of indisposition or disordered health, but, as we have already indicated, she alleges conditions which may affect her interest in the premises. In the defendant's brief it is said that the property has been leased from the owner and is occupied by the plaintiff and her husband as tenants, and in *Hines's case, supra, Hoke, J.,* held that it is not material whether the tenure of the occupant is that of owner or renter, for either may maintain the action. To what extent the plaintiff's interest, if any, may be affected does not distinctly appear. While neither the character nor the duration of the lease is specifically alleged in the pleadings, no question is raised in the record as to the plaintiff's right to prosecute the suit without the joinder of her husband; but with a view to determining the whole controversy, we suggest at least the expediency of making him a party plaintiff.

The judgment sustaining the demurrer is

Reversed.

W. H. KEITH v. O. D. BAILEY.

(Filed 4 April, 1923.)

1. Statute of Frauds—Fraud—Writing—Contracts.

To enforce a contract to convey land against the bargainee, who is the party to be charged under the provisions of the statute of frauds (C. S., 988) it is required that the written memorandum or contract shall be so reasonably certain or definite in its terms that the substance and essential elements may be understood from the written agreement itself, unaided by recourse to parol evidence.

2. Same—Parol Evidence—Evidence.

The owner of land entered into a contract with plaintiff to convey to him certain lands, sufficient under the statute of frauds, C. S., 988, and plaintiff gave to defendant a paper-writing agreeing to convey the lands, which was silent as to time, terms of payment, etc. The contract to which the plaintiff testified on the trial was partly in parol and did not correspond with the written memorandum, but was inconsistent with its terms: *Held*, that the memorandum not being the contract between the parties, the plaintiff was not entitled to recover.

APPEAL by defendant from *Lyon, J.*, and a jury, at September Term, 1922, of WAKE.

On 12 April, 1920, S. A. Cannady and his wife executed a written agreement to convey to the plaintiff a tract of land containing 124½ acres at the price of $6,250, to be paid as follows: $500 cash, $1,500 on 15 December, 1920; $2,000 on 15 December, 1921; and $2,250 on 15 December, 1922. The deed was to be delivered when the plaintiff paid the last installment. Thereafter the defendant entered into negotiations with the plaintiff for the purchase of the land, and caused to be prepared the following paper, which was signed by the plaintiff and his wife on 12 June, 1920: "This is to certify that I, W. H. Keith, for and in consideration of $5, have agreed to sell to O. D. Bailey the Rat Cannady home place in Wake County, bought by me at public auction for the sum of $8,200. I agree to sell to O. D. Bailey the whole Cannady tract of land; this 12 June, 1920."

The defendant did not take possession of the land, but wrote two letters in October and one in November informing the plaintiff he was "going to ask off from their land trade," and returned to the plaintiff the paper dated 12 June.

The plaintiff then brought suit to recover damages for the defendant's failure to comply with his contract, and at the trial defendant offered no evidence, and moved for judgment of nonsuit upon the evidence introduced by the plaintiff. The motion was denied, and the defendant excepted. The verdict was as follows:

"1. Did the defendant agree to buy the land from plaintiff at the price of $8,250, as alleged in the complaint? Answer: 'Yes.'

"2. Did defendant break said contract? Answer: 'Yes.'

"3. What damages, if any, is plaintiff entitled to recover? Answer: '$700.'"

Judgment was rendered for the plaintiff, and the defendant appealed.

J. M. Broughton for plaintiff.
C. A. Hall for defendant.

ADAMS, J. All contracts to sell or convey lands, or any interest in or concerning them, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized. C. S., 988.

The defendant, who is the party to be charged (*Hall v. Misenheimer,* 137 N. C., 184), contends that he signed no memorandum or note in contemplation of the statute; that the contract to which the plaintiff testified at the trial was not reduced to writing; that he was under no legal obligation to purchase the land; and consequently that he is not liable in damages. *Burriss v. Starr,* 165 N. C., 657; *Boger v. Lumber Co., ibid.,* 557; *Richards v. Lumber Co.,* 158 N. C., 56; *Hall v. Misenheimer, supra; Gwarthmey v. Cason,* 74 N. C., 6.

In our estimate of the circumstances disclosed by the evidence it is unnecessary to consider the questions whether the defendant "signed" the memorandum, and, if he did, whether it contains his implied promise to pay the purchase money; for if these contentions be admitted, there is another conclusive reason why the plaintiff cannot maintain his action.

The alleged contract between the plaintiff and the defendant cannot be enforced unless it complies with the Statute of Frauds. It is a rule of general if not universal application that the memorandum of a contract to convey or to purchase land shall be reasonably certain and definite in its terms, so that the substance and essential elements may be understood from the written agreement itself, unaided by recourse to parol evidence. The written contract must adequately express the intent and obligation of the parties and all the essential elements of the agreement with reasonable certainty, and parol evidence cannot be received to supply anything which is wanting in the writing to make it the agreement on which the parties rely. *Mayer v. Adrian,* 77 N. C., 83. In *Hall v. Misenheimer, supra, Walker, J.,* said: "The statute expressly requires a contract to sell land, or some note or memorandum thereof, to be put in writing and signed by the party to be charged therewith or by his lawfully authorized agent. The Code, sec. 1554. In order, there-

fore, to charge a party upon such a contract, it must appear that there is a writing containing expressly or by implication all the material terms of the alleged agreement, which has been signed by the party to be charged, or by his agent lawfully authorized thereto."

In attempting to establish his cause of action, the plaintiff disregarded this principle. In the receipt which he gave the defendant, no time was specified when the price should be paid or the deed should be executed. We need not decide whether the failure to designate the time of payment renders the contract unenforceable against a plea of the Statute of Frauds, or whether under these circumstances a sale for cash will be presumed (*Ebert v. Cullen,* 33 L. R. A. (N. S.), 84, and note), for the plaintiff testified upon the trial to an agreement with the defendant all the terms of which were not in writing. He testified that the agreement was this: the defendant was to pay him, not the purchase price of $8,250 as shown in the receipt, but only his profit of $2,000; and then, in his exact words, "Of course, Mr. Cannady was to get the payments any way he (the defendant) wanted to pay it, and instead of Mr. Cannady making me the deed, he was to make the deed to him." This evidence related to a parol agreement which was not in compliance with the statute of frauds.

The plaintiff cannot recover on the memorandum or receipt (even if it be otherwise sufficient), because it does not embody the entire contract, nor on the agreement to which he testified at the trial, whether considered independently of or in connection with the receipt, because in either event is there no written note or memorandum signed by the party to be charged and embracing all the essential terms of the contract which the evidence tends to establish.

Upon the plaintiff's evidence the defendant was entitled to a judgment dismissing the action as in case of nonsuit. The judgment and verdict will therefore be set aside, and the action dismissed.

Reversed.

ELIZABETH WOOD v. C. J. ROBERTS ET AL.

(Filed 4 April, 1923.)

Appeal and Error—Certiorari—Laches.

It appearing on this motion for a *certiorari* by the appellants to bring up the case tried in the Superior Court for review in the Supreme Court, that the record proper has been properly filed, and the failure of the record to have been docketed in time was for reasons beyond the appellant's control, and that he was not guilty of laches, but that he has

a case appearing to be meritorious: *Held*, the writ prayed for is granted. though the Court does not commend the irregular manner in which the petition was prepared and the informal manner of stating the facts.

Wright & Stevens for plaintiff.
J. Felton Head for defendants.

WALKER, J. This is an application by the defendants for a *certiorari* to bring up the case on appeal to be hereafter settled by the presiding judge. The petitioners have filed the record proper and based their claim to the writ upon it and the fact that the judge has been unable to settle the case on appeal, by reason of obstacles beyond the control of the defendants, and the consequent inability to obtain a copy of the translated notes of the court stenographer, and for these and other valid reasons the controverted matters relating to the case could not be settled and determined by the judge. It appears from the very meager statement of the facts that the defendants have not been in default and have complied with the statute and rule of this Court in docketing the record here and doing all within their power to accomplish an early hearing of the case. For these reasons this Court has granted the prayer of the petitioners, but does not commend the irregular manner of preparing the same, and the rather indefinite and informal manner of stating the facts. Sufficient appears, though, to indicate that the case should be reviewed, as the defendants have not been negligent or dilatory, but reasonably diligent. It is, therefore, ordered that a writ of *certiorari* be issued from this Court by the clerk, in accordance with the petition, and when the return comes in, the case may be set for hearing on some future day in this term, if the parties so desire, or continued.

Petition allowed.

TOBACCO GROWERS COOPERATIVE ASSOCIATION v. W. T. JONES.

(Filed 11 April, 1923.)

1. Monopolies—Restraint of Trade—Coöperative Marketing—Trusts—Statutes.

Laws 1921, ch. 87, known as the Coöperative Marketing Act, is an enabling act whereby an organization among tobacco growers may be formed by the voluntary act of those joining therein for handling the product of its members, to enable them to obtain a fair price therefor without profit to the organization itself, in opposition to any agreement among the manufacturers or others that may have a contrary effect, and under conditions that will keep the public informed of its methods, and control them under governmental supervision when they go beyond a protective

policy or become monopolistic in effect; and the statute, and the organizations formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State.

2. Same—Lawful Associations—Government Control.

The agreement to form an association under Laws 1921, ch. 87, known as the Coöperative Marketing Act, becomes binding at once upon its being accepted by the association after incorporation: and the marketing provisions being available only to the members of the association, and the charter of the association being subject to repeal by the Legislature whenever it should become dangerous to the public, and subject to the intervention of the court to prevent monopoly; the association having no capital stock or surplus, nor credit, except as given by statute, which may be withdrawn at any time, and wholly dependent to borrow money in large sums necessary to the carrying out of its plans, under the control of the Federal Reserve Banking System, under such terms as the Federal board deems consistent with the public welfare, which will not permit a monopoly: *Held*, the governmental control thus to be exercised renders the coöperative plan for the protection of its own members incapable of exercise to the extent of a monopoly or restraint of trade prohibited by law.

3. Same—Liquidated Damages—Contracts—Breach—Equity—Injunction.

An organization formed under the provisions of Laws 1921, ch. 87, known as the Coöperative Marketing Act, being permitted only to handle the product of its own members without profit, the provisions of the act are valid allowing it to contract with its members for the sole handling of their crops, and upon the breach by a member of this contract, the recovery of liquidated damages and all cost of the action, including premiums for bonds, expenses, and fees, and affording it equitable relief by injunction to prevent the further breach of the contract by a member, and a decree of specific performance; and also allowing, pending the adjudication of such actions, a temporary restraining order against the member upon the filing of a verified complaint showing the breach of the contract, with the filing of sufficient bond.

4. Same—Subsidiary Companies.

Objection to the validity of the Coöperative Marketing Act that an organization of tobacco growers thereunder has formed subsidiary or minor companies to cure tobacco, redry it, and store it, prize it, and get it ready for market, is without merit; the money for such purpose being very small, specifically limited and under a complete system for its return to its members who have contributed it, it being necessary for the association to own or control enough of the facilities to make effective the authorized purposes of its organization.

5. Same—Corporations—Charter Period of Existence.

The provisions in the charter that an association under the provisions of the coöperative marketing act exists for five years, is the same as applies to a period limited for the existence of other corporations formed under other legislative acts, and does not contemplate that the association hold over the crops raised in one year for one or more successive years, such being destructive of the purposes of the association as contemplated by the statute.

6. Same—Publicity.

The provision in the Coöperative Marketing Act for the appointment of a director by each of the governors of the three states of Virginia, North Carolina, and South Carolina is not objectionable on the ground that these three directors can control the other twenty-two chosen by the members under the plan outlined in the statute, the purpose therein being that the public may have opportunity to learn at all times how the business is being conducted, and to insure that it will be carried on in a manner that will not be detrimental to the public welfare.

7. Same—Contracts—Presumptions of Validity.

The legal presumption is in favor of the validity of the marketing contract made by a member with the coöperative association, in an action by the latter against the former for its breach, which presumption will only yield when its illegal character plainly appears; and *Held*, in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the Anti-trust Law, or in restraint of trade.

APPEAL by defendant from *Daniels, J.*, at chambers, 18 October, 1922, from NASH.

This action is by the Tobacco Growers Coöperative Association, organized under the Coöperative Marketing Act of this State, Laws 1921, ch. 87, against one of its grower members to enjoin him from delivering and selling to parties other than plaintiff association portions from his 1922 crop of tobacco, and asking to recover, also, liquidated damages for the tobacco sold by him prior to the commencement of this action. The appeal is from the order granting the injunction *pendente lite* entered on 18 October, 1922, by *Daniels, J.*, at chambers.

Said coöperative association is a nonprofit corporation, without capital stock. Its members are growers of tobacco in North Carolina, Virginia, and South Carolina. Prior to its organization, there was circulated through said states a form of association agreement whereby growers agreed to become members of the proposed marketing association, and upon due incorporation, bound themselves to deliver to it all the tobacco produced by them for a period of five years.

Among the signers of this agreement was the defendant W. T. Jones. Notwithstanding this agreement to deliver his tobacco to the association, he sold part of his 1922 tobacco upon the warehouse floor, and has announced that he will not deliver any of the remainder thereof to the association, but will continue to violate his contract.

The association, therefore, under the terms provided by the Coöperative Marketing Act has brought this action against him for liquidated damages covering the tobacco already sold and for an injunction to prevent further breach of his contract. A temporary restraining order was issued, together with notice to show cause why an injunction *pendente*

lite should not issue. At the hearing the motion for an injunction *pendente lite* was granted, and the defendant appealed.

Aaron Sapiro, Lawrence L. Levy, Burgess & Joyner, James H. Pou, and Stephen C. Bragaw for plaintiff.

L. V. Bassett, F. S. Spruill, and Joseph B. Ramsey for defendant.

CLARK, C. J. The defendant contends that the Coöperative Marketing Act is unconstitutional and void, and that the contract between plaintiff and defendant is invalid because in restraint of interstate and intrastate commerce; and, therefore, that the injunction was improvidently granted.

The plaintiff contends that the Coöperative Marketing Act is constitutional, and that a coöperative marketing association organized for the handling of its members' products only is entitled to an injunction against the grower member who threatens to breach his marketing agreement; that the marketing agreement is not in restraint of interstate commerce nor violative of any Federal anti-trust law or law against monopolies, and does not violate the statutes, public policy, or Constitution of this State.

The Coöperative Marketing Act under which the plaintiff association is organized, Laws 1921, ch. 87, is an enabling act whereby a particular kind of organization may be formed. Any persons able and willing to avail themselves of the provisions of the act may organize such coöperative association. Section 1 of said act declares its purpose to be: "In order to promote, foster, and encourage the independent and orderly marketing of agricultural products through coöperation, and to eliminate speculation and waste, and to make the distribution of agricultural products as direct as can efficiently be done by the producer and consumer, and to stabilize the marketing problems of agricultural products, this act is passed."

The act provides in substance that any five or more persons engaged in the production of agricultural products may form a nonprofit cooperative association to engage in any activity in connection with the marketing and selling of the products of the members of such association, but that such association can handle only the products of its members, and producers only are eligible to membership; the articles of incorporation contain the provisions required in the incorporation of business corporations, and, in addition, there must be a statement showing whether the association is organized with or without capital stock; whether the property rights of the members shall be equal or unequal; if unequal, general rules must be made applicable to all members whereby property rights will be determined, and these rules must apply to new members as

well as old, and may not be changed except by consent of three-fourths of the members. These articles must be filed in the same manner as those of any other general business corporation, and a certified copy must be filed with the Chief of the Division of Markets.

There are also provisions requiring a code of by-laws protecting the rights of members and conserving the status of the association as a non-profit corporation for coöperative marketing of its members' products with the usual stipulations for the time, place, and manner of calling and conducting meetings; the number of members constituting a quorum; the right to vote by proxy, and the power and duties of officers and directors.

There is also provided that the marketing contract between the association and the members may be embodied in the by-laws, which shall determine the method of permitting the withdrawal of members or transfer of stock; the conditions upon which membership shall cease and the automatic suspension of a member when he ceases to be a grower. Upon death, withdrawal, or expulsion of a member, his interest in the association must be appraised and the value of that interest must be paid to his heirs or to himself, as the case may be.

Ten per cent of the members may petition the directors for a special meeting, and the directors must thereupon call such meeting. The directors may be elected by districts, so as to give the membership proportionate and equitable representation. One of the directors is required to be appointed by the director of agricultural extension, or some other public official, in order to maintain through such representation direct public interest in and supervision of the management of the association. Besides, the governors of North Carolina, South Carolina, and Virginia have each appointed a director, who sits with the board in all its deliberations. This is not to control, but to keep the public in touch and fully informed as to the policy pursued by the association.

The election of officers is provided for, together with reasonable compensation for officers and directors, and, in order that coöperative associations may not be instrumentalities for private gain, it is provided: "No director during the term of his office shall be a party to a contract for profit with the association differing in any way from the business relation accorded regular members or holders of common stock of the association, or to any other kind of contract differing from terms generally current in that district." It is further provided that the liabilities of members and stockholders are the same as in other corporations, but no stockholder may own more than one-twentieth of the common stock, and the by-laws may limit such stock ownership to an amount less than one-twentieth, and that in any event no member or stockholder can have

more than one vote. Stock can be transferred only to a person engaged in agriculture, whose products are handled by the association.

Provision is also made for the recall of officers or directors after a proper hearing, and any action of the board of directors may be referred to the members for decision upon the demand of one-third of the board. The association is authorized to make contracts with its members, requiring them to sell, for a limited period of time, all or part of their agricultural products. As the association is not permitted to handle the products of nonmembers, it was necessary to make special provision for the enforcement of these contracts. The law therefore permits liquidated damages in case of breach; indeed, such damages would have been allowed without any statutory provision: *Bradshaw v. Milliken*, 173 N. C., 434 (*Walker, J.*); *Burley Tobacco Association v. Gillespie*, 51 Ind. App., 583; *Milk Producers Association v. Armstrong*, 178 N. Y. S., 612; *Castorland v. Schantz*, 179 N. Y. S., 131; *Ex parte Baldwin County Asso.*, 203 Ala., 345; *Citrus Fruit Association v. Yeoman*, 197 Pac. (Cal.), 959.

Damages, of course, are of no real value. The association must have crops to market or it will go out of business, therefore, relief in equity is provided, and it is an essential point in this case. Section 16-c of the statute therefore provides: "In the event of any such breach, or threatened breach, of such marketing contract by a member, the association shall be entitled to an injunction to prevent the further breach of the contract, and to a decree of specific performance thereof. Pending the adjudication of such an action, and upon filing a verified complaint showing the breach, or threatened breach, and upon filing a sufficient bond, the association shall be entitled to a temporary restraining order and preliminary restraining order against the member."

On account of the coöperative nature of the enterprise, and since it makes no profit, a grower who has breached his contract must pay the cost of suit, including premiums for bonds, expenses, and fees in the action. The membership of the association is limited to growers, and a contract breaker breaches his contract against his fellow-members, and it would be unfair to make them pay for his violation. The association has no profits with which to take care of this expense.

The association is required to make annual reports to the Division of Markets of the State, giving a complete statement of its business during the past year, its total expenses, its indebtedness, and its balance sheet, thus further insuring public control of all its activities.

Section 26 provides: "*The association not in restraint of trade.* No association organized hereunder shall be deemed to be a combination in restraint of trade, or an illegal monopoly, or an attempt to lessen competition, or fix prices arbitrarily, nor shall the marketing contracts or

agreements between the association and its members, or any agreement authorized in this act be considered illegal or in restraint of trade."

The act establishes a complete plan of organization for coöperative marketing of agricultural products under the fullest public supervision and control. Every possible safeguard against private profit, manipulation by a few powerful members, and "squeezing out" of the weaker members and abuse of powers are embraced in the law.

This association is organized under this statute and pursuant to its provisions made a contract with the defendant as one of its members. The contract is first a coöperative association agreement, and second, a marketing agreement. The association agreement became binding at once; the marketing agreement became binding when accepted by the association, after incorporation. The agreement is signed only by growers of tobacco in North Carolina, Virginia, and South Carolina, and the signers state the object of the organization therein as follows: "The undersigned propose to organize a nonprofit association, without capital stock, for the purpose of promoting, fostering, and encouraging the business of marketing tobacco coöperatively, for reducing speculation, for stabilizing the local tobacco markets, for coöperatively and collectively handling the problems of tobacco growers," and for other pertinent purposes. Membership is limited to the actual growers of tobacco, or landlords who receive rental in tobacco. A board of 25 directors is provided for, 22 of whom are elected by the members chosen by the voting districts so as to give all members an equitable and proportionate representation. The delegates are elected at a primary election, who choose the directors, one director being chosen for each district and one director each to be appointed by the governors respectively of the three states. Each member is limited to one vote, the entrance fee is fixed at $3; the association is confined to the marketing of tobacco, and has only tobacco producers for its members.

After stating the purposes as above, the agreement provides: "The association agrees to buy and the grower agrees to sell and deliver to the association all the tobacco produced by or for him, or acquired by him as landlord or lessor during the years 1922, 1923, 1924, 1925, and 1926." It is further provided that "All tobacco shall be delivered at the earliest reasonable time after the picking or curing to the order of the association at the warehouse or plant controlled or specified by the association"; and that "The association shall pool or mingle the tobacco of the grower with tobacco of a like type, grade, and quality delivered in the same crop by other growers. The association shall classify the tobacco and its classification shall be conclusive." It is also provided that the association shall resell all tobacco at the best price obtainable and pay net profits to the grower, the cost of operation and overhead

will be deducted, but the association is forbidden to make any profit for itself; and further, it is provided that the net proceeds shall be divided ratably among the growers in proportion to their deliveries to each pool.

Then there is the provision that the member shall deliver all the tobacco he raises as follows: "This agreement shall be binding upon the growers as well as upon him who produces tobacco, directly or indirectly, or has the legal right to exercise control of any commercial tobacco or any interest therein as producer or landlord during the term of this contract"—that is, for the five years named in the contract. It is also specially provided in the contract that should the grower fail to so sell and deliver all his tobacco, he agrees to pay to the association for all tobacco delivered, consigned, or marketed either by or for him, other than in accordance with the terms hereof, "the sum of five cents per pound as liquidated damages," and that "in the event of a breach or threatened breach of any provision regarding delivery of tobacco, the association shall be entitled to an injunction to prevent the further breach thereof, and to a decree for specific performance"; and that the grower who makes a breach of this contract shall be liable for "all costs of litigation and all necessary expenses caused thereby," and that no oral or other conditions shall vary the written contract which it is stipulated contains the entire agreement of the parties. This, somewhat condensed, states the powers and the terms of contract under which the plaintiff association is acting.

Section 26 of the statute provides, as above stated: "No association organized hereunder shall be deemed to be a combination in restraint of trade or an illegal monopoly, or an attempt to lessen competition, or fix prices arbitrarily, nor the marketing contract or agreement between the association and its members, nor any agreements authorized in this act be considered illegal or a restraint of trade."

The constitutionality and validity of this statute are determinative of this controversy, and, in effect, cover the entire subject of this litigation.

Agriculture is the greatest business in this country, and as said in *Bickett v. Tax Commission*, 177 N. C., 439, "By the census, 81 per cent of the people in this State are engaged in farming." In that case, Laws 1919, ch. 168, entitled "An act to provide improved marketing facilities for cotton," was held constitutional and valid, and that decision is practically conclusive of this case. The object in view of that statute, as in this, was to protect the farmers against combinations by which they were forced to accept in the sale of their produce prices fixed by combinations of buyers or manufacturers, and it was intended to give them an opportunity by agreement among themselves to dispose of their products under regulations which would protect them. There was no intention, and it is clear there is nothing in this State, to enable the pro-

ducers to combine to sell their products at a profit beyond what would be a fair and reasonable market price. Indeed, this would be impossible on the part of the producers, as only a part of them would in any event belong to such an organization; whereas, the manufacture of tobacco, being in comparatively a few hands, the buyers could combine, as they have done for many years, in a so-called "gentlemen's agreement" to fix the price which would be paid for the raw product and agree in the same way upon a price for the manufactured product, with the well known result that the producers of tobacco, the farmers, have received the bare cost of production in this artificial market, and not always that, while the combination of tobacco manufacturers have accumulated vast fortunes.

In view of the necessity of protecting those engaged in raising tobacco against the combination of those who buy the raw product at their own figures and sell it to the public at prices also fixed by themselves, this movement has been organized.

By a careful examination of all the provisions of the act under which the association is acting, it will be seen that every precaution has been taken to insure that it will not be used for private gain, and can operate only for the protection of the producers.

In *Mar-Hof Co. v. Rosenbacker,* 176 N. C., 330, the whole subject is admirably discussed by *Mr. Justice Hoke,* in which he states that originally at common law all agreements in restraint of trade were held void as being against public policy. This, however, he says has been more and more modified by the decisions of the courts until it has come to be a generally accepted principle that agreements in partial restraint of trade would be upheld when they are "founded on valuable consideration, are reasonable and necessary to protect the interest of the parties in whose favor they are imposed, and do not unduly prejudice the public interest," quoting Clark on Contracts. This same doctrine has been sustained in *Bradshaw v. Millikin,* 173 N. C., 432.

In two notable instances, *Standard Oil Co. v. U. S.,* 221 U. S., 1; and *U. S. v. American Tobacco Co., ibid.,* 106, stipulations in partial restraint of trade were held not to be obnoxious to the law unless they were unreasonable and likely to become monopolies, which are obnoxious to our constitutional provisions, Const. of N. C., Art. I, sec. 31, which provides that "Monopolies are contrary to the genius of a free state, and ought not to be allowed."

An examination of this statute shows, we think, that this association is authorized for the purpose, not of creating a monopoly, but to protect the tobacco producers against oppression by a combination of those who buy, and not to authorize, and does not empower, those who produce the raw material to create a monopoly in themselves.

Indeed, it seems to us plain that the plaintiff, under the provisions of its charter, is not and never can become a monopoly for many reasons: (1) As a corporation of North Carolina, the moment it should become dangerous to the public, if that were possible under the terms of its charter, the General Assembly can at any time repeal its charter (Const., Art. VIII, sec. 1), and the courts will intervene to prevent it becoming a monopoly. (2) The plaintiff has neither capital stock nor surplus, nor credit, except as given it by the statute, and this latter may be withdrawn at any time. It is wholly dependent upon its ability to borrow in large sums which is necessarily under the control of the Federal Reserve Banking System, and the moment it shall deny credit to the plaintiff its sufficiency would be destroyed. It can borrow from the Federal Reserve System, which is a function of the Government, only on such terms as that board deems consistent with the public welfare, and that board will not permit hoarding or monopolizing by the plaintiff. The power of the Federal Reserve System was shown in October, 1919, when by mere announcement of its policy it caused the deflation of the stock market. In May, 1920, when the operations of the War Finance Corporation were suspended by direction of the Secretary of the Treasury, so that it could not extend credit for the export of cotton, because cotton was scarce and a cotton famine was threatened, there resulted a drop in cotton of 30 cents a pound in six months. Therefore, were the plaintiff to attempt to monopolize the sale of tobacco, not only it would fail to control its sale by the large numbers of producers who are not members of the organization, but it would be faced with the power of the General Assembly to repeal its charter, and to put it into the hands of a receiver like the proposal in 1893 to abolish the Farmers Alliance Business Agency; and it would be denied the privilege of borrowing from the Federal Reserve Bank or any of its correspondents.

It would be subject to the visitorial powers of the Secretary of Agriculture under the anti-trust laws, and finally it would be confronted with the huge increase in the acreage devoted to tobacco and by the holding off from the market the normal production of any one year, the result would be the selling of two crops within a single year. As was well said by Mr. Pou, one of the counsel for the plaintiff, "these conditions make it physically, economically, and financially impossible for the plaintiff to become a monopoly."

The plaintiff will continue to exist only if it provides for a normal, orderly marketing of the tobacco crops, and by putting on the markets of the world annually the production for that year. Its sole purpose is by an orderly marketing of the crop to make large saving, and to secure to the producers a fair and reasonable price therefor without increasing the price the consumer will pay for the manufactured article.

The sole object of the association is to protect the producer of the raw article from depression in the price by the combination of the large manufacturing corporations controlled by a few men who can at the same time not only decrease the price to the producer, but can increase it at will to the consumer, and thereby accumulate in a few hands sums beyond computation. The coöperative association purposes to eliminate unnecessary expenses in selling, and to prevent artificially forced reduction in the price paid to the producers.

Instead of creating a monopoly, the object is by a rational method of putting the raw product on the market from time to time as there is a legitimate demand for its manufacture, and by the extension of credit to farmers to enable this to be done, to prevent a monopoly of the tobacco industry by those who manufacture it.

The defendant contends that the charter and contract contain unusual provisions restricting the rights of the members; but, in the first place, every member becomes so voluntarily. Each grower of tobacco has the privilege of joining or not, as he sees fit, and no one else can do so. The terms of the statute and the contract as set out in this record are plain, and there is nothing concealed.

It is also argued that the coöperative marketing system is a detriment to the public, but no citizen not a member has seen fit to intervene upon an allegation that the public has been injured. No person has come into court and said that he has been deprived of any rights, and the courts will only hear those who make such assertion upon the proper proof.

Again, it is charged that some of the money of this corporation is used in the formation of subsidiary or minor companies which will process tobacco, redry it, store it, prize it, and get it ready for market. This is true, but the amount of money that can be used for this purpose is very small, is specifically limited, and there is a complete system prescribed for its return to the persons who contributed it. The facilities named are necessary in the tobacco business; and unless the coöperative association owns or controls enough of these facilities to handle the tobacco it will own, it will be at the mercy of its competitors.

It is common knowledge that two years ago the coöperative marketing of peanuts in northeastern North Carolina and southeastern Virginia was paralyzed because the coöperative association did not own cleaning establishments. They were dependent on their enemies to do the cleaning for them, and those enemies easily imposed such terms as absorbed all profit. Now the peanut corporations, like the cotton and tobacco, are provided with all facilities.

The enemies of the coöperative system would be delighted if the courts were to hold that a coöperative association is not permitted to use its own money in establishing warehouses, prize houses, redrying and processing

plants, and were forced to depend for these facilities upon such terms as the association could make with its competitors. The latter would be in the position of an army well armed, meeting in battle another army with no arms at all.

The coöperative association is merely granted by the statute the privilege of building or constructing the necessary instrumentalities for carrying out the purposes of the association, and of using its own money therefor, under terms and conditions specified in the contract and agreed to by all its members. The coöperative marketing system has justified itself.

When the World War ended there was a scarcity amounting almost to destitution in some sections, and in others there was so great an abundance that the producers could not obtain a reasonable living. For the producers of agricultural products the prices were low, and there was no profit. To the consumer prices were so high that consumption was restricted, and something like famine prevailed. These extremes existed in the same county and at no great distance apart. Middlemen, speculators, and people who stood between the producers and consumers derived excessive profits from this situation, while the producers and laborers were denied a living, and from the consumers were extorted enormous profits. It was the hey-day of profiteering.

The coöperative marketing system was forced into existence to guarantee fair prices to the producer, a fair wage for labor, and to prevent extortion upon the consumer. It increased consumption by furnishing the consumer a regular supply at less price, and at the same time enabled the laborer and the farmer to obtain a remunerative return. In addition, the coöperative system eliminated unnecessary expenses and costs as well as the enormous speculative profits realized by combinations which had taken control of the entire process between the producer and consumer. For instance, when the cotton crop began to be marketed in October, the price dropped, and the farmer was forced to sell to meet the bills he had incurred for fertilizers, and the money borrowed for the payment of labor, and as it dropped there was a progressive pressure for further reduction in price and the returns to the farmer were pitifully inadequate; but when the cotton had thus been forced from the hands of the farmer upon the market, the great combinations, which had bought up the crop at the low prices, realized enormous profits by the sale of the cotton at high prices during the seasons when there was no longer cotton in the hands of the farmer.

It is current knowledge that during this year something like two million bales of the cotton crop have been controlled by the coöperatives. They did not dump this cotton on the market. The cotton coöperative association borrowed from the Federal Reserve; advanced to the farmers,

and enabled them to hold the cotton in the warehouses provided for that purpose. Cotton opened at about 20 cents in September, but instead of going down, as heretofore, it has risen steadily, and is now around 30 cents. This may not be due entirely to the coöperatives, and to some extent can be accounted for by the smaller size of the cotton crop, but the coöperative system has been a material factor.

The Tobacco Coöperative Association has been the offspring of a similar situation. Individual fortunes, aggregating many hundreds of millions of dollars in a few hands, have been created by the sale of the tobacco crop at prices fixed, as is well known, by a "gentlemen's agreement" among the manufacturers, who are few in number and strong financially, who at the same time have kept up, by similar agreements, the prices of the manufactured article to the public.

There is no analogy between the proceedings to dissolve the great trusts which have benefited by this system, as in the *Standard Oil* and *American Tobacco cases,* and others, and these associations for the protection of the producers of cotton, tobacco, and peanuts, to market and to create facilities by which their crops will be placed upon the market gradually as called for and not dumped into the hands of great financial associations at a financial sacrifice to the producers to be resold or manufactured at great profit. It is an entire misunderstanding of the facts to assert that an orderly, systematized coöperation among the producers to prevent a sacrifice of their products and to realize a living wage for the laborer and a reasonable profit for the producers has any analogy to the system by which great combinations of capital have prevented the laborer and the farmer alike from realizing a reasonable reward and a decent living.

In fact, the coöperative system is the most hopeful movement ever inaugurated to obtain justice for and improve the financial condition of farmers and laborers. The producers are paying all the costs and assuming all the responsibilities of these coöperative associations. They are taking all the risks. They are asking no assistance from the public treasury. They are forcing no one to join, and they are exacting no inordinate prices for their product. They are associating themselves as authorized by the statute, like other persons, and they have signed mutual and fair agreements among themselves which will be futile unless those who have signed such agreements can be held to abide by the terms of their contracts.

It must be noted that the provision that the association exists for the term of five years is merely the same provision that fixes a term of years for the existence of all other incorporations. There is nothing in the charter, or in the contract, which contemplates or authorizes the holding of these products for the term of five years. It would be destructive

of the object of the association were this even attempted, for it would force the sale in the second year of two years crops and in the third year of three years, which would destroy the very purpose of the association. Besides, not only would the Legislature interfere to repeal the charter, but if this were attempted the association would be without the means to advance funds to their members to carry on their operations and the courts would intervene in such case to forbid such a result which would be illegal at common law.

The provision for the appointment of a director by each of the governors of the three states of Virginia, North Carolina, and South Carolina is not based, as the defendant contends, upon the idea that three directors can control the other twenty-two. But the three directors appointed by the governors of the states named are there that the public may have opportunity to learn at all times how the business is being conducted and to insure that it will not be carried on in a manner that will be detrimental to the public welfare. In short, they are placed on the board to prevent secrecy and to guarantee publicity, and in order that the public may be kept in touch and fully informed as to all the proceedings of the coöperative association.

If there had been the same provision in the incorporation of the Standard Oil Company, the American Tobacco Company, the steel trust, and of great railroad companies and all great financial combinations whose operations vitally affect the public at large, it would have been a great benefit to the people, and have prevented enormous abuses. It certainly cannot be an objectionable feature here.

The legality of these associations has been upheld in many decisions in other courts, but after what has been recited as to the terms of the charter and of the contracts and the reasons just given, it would be merely vain repetition to show that other courts have taken the same view that we have expressed.

Without quoting, therefore, from the numerous decisions which have reached the same result, it may not be invidious to say that the whole subject has been fully discussed and the same conclusion reached in the very recent case of the *Coöperative Association v. Lentz* by the Supreme Court of Oregon, in an opinion filed on 13 February, 1923, 212 Pac. Reporter, 811-819. The association in that case, while essentially of the same nature with the one at bar, concerned not tobacco or cotton, but the marketing of loganberries. The principles applicable, however, are the same, and the Court held that the association was valid.

These are matters of general knowledge and of public interest, of which the courts take judicial notice. In *Owen County v. Brumback*, 128 Ky., 152, the Court, taking judicial cognizance of such facts, said: "The farmers scattered all over the State, each acting independently and

separately for himself, were unable to dispose of their crops at a fair and reasonable price. There was practically no competition among the purchasers of their crops. A combination and trust had been formed by the buyers to depreciate the value of the crops below their real value, and, single-handed, the producers were unable to combat or deal on terms of equality with these trusts and combinations that controlled the markets in which the farmers were obliged to dispose of their products. To meet the condition of affairs thus presented, and to enable the farmers to combine their resources and place their products in the hands of an agent selected by them, to the end that better prices might be obtained, this (coöperative) act was passed."

In *Burley Tobacco Company v. Gillespie,* 51 Ind. Appl., 593, the Court, quoting the above, said: "In the above case the Court held that a statute authorizing the pooling of crops for the purpose of depreciating any commodity below, or enhancing it above, its true value would be in violation of the constitutional provision, and any pool or combination entered into for such purpose would be invalid. But in the absence of some allegation and proof that such was the purpose of the combination, courts would indulge the presumption that the party, by entering the combination and by the execution of such contract, intended only to enter into such engagements as were lawful, and such contracts should, in the absence of allegation and proof to the contrary, be construed as limited to lawful purposes under the statute and Constitution."

In *Commonwealth v. Hodges* (1910), 130 Ky., 246, the Court said: "The conditions which gave rise to the act are known of all men. At the time of its enactment there was but one buyer for the farmers' tobacco. It matters not how hard he labored, how valuable his soil, or fine the quality of the crop he raised, he was obliged to accept whatever that buyer might offer. Indeed, in many instances the buyer absolutely refused even to examine his crop or to make any offer at all. Instead of the plenty to which the farmer was accustomed, and to which he was entitled, he stood face to face with privation and want. As individuals, the farmers were unable to cope with the situation." Quoting this case, the Indiana Court, above quoted, said: "While these cases carry the rule of judicial knowledge far, it is clearly the law that the courts will take judicial cognizance of the history of the country and the facts of common knowledge which go to make up its history. To hold that courts do not judicially know that in the year 1909 there was in this country a combination among the manufacturers of tobacco, which controlled the leaf tobacco market, and known as the *Tobacco Trust,* would be to impute to courts a lack of knowledge possessed by the public generally. Moreover, the authorities seem to recognize an exception in cases presenting facts similar to those averred and judicially recognized in the

case before us. In Greenhood Public Policy, 645, the rule is laid down that combinations to raise prices to a reasonable point are valid among men engaged in business which had become ruinous, especially when their operation is limited in every essential particular." Similar rulings have been made in many cases that the courts would take judicial notice of these well known facts of universal knowledge.

Every word of these decisions apply with the utmost force to the situation in this State, where these facts existed to the extremest degree with the resulting injury to the tobacco farmers of the State and the accumulations of enormous profits by the trusts, whose stocks have been sold in great amounts, and which, when sold, are by statute made free from all taxation in the hands of the purchasers.

The operations of these buying trusts have been fully detailed in many decisions of the courts, notably in the *Standard Oil* and *American Tobacco Company cases,* in the latter of which their operations are graphically summed up by *Chief Justice White* for a unanimous Court as an "ever-present manifestation which is exhibited of a conscious wrong-doing by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same." *U. S. v. American Tobacco Co.*, 221 U. S., 182. It is thus that our highest Court has described the methods by which the producers have been stripped of the lawful returns for their labors, and against which these coöperative associations have been organized and chartered as their protection.

In this record there is no averment in the complaint or provision in the contract disclosing that appellant, by reason of the pool, proposed to sell the tobacco of appellee for a sum greater than its true and actual value, and all presumptions will be indulged in favor of the legality of the contract, and such presumption will only yield when its illegal character plainly appears. It may be well admitted that the statute under which the plaintiff association was organized was enacted by the Legislature to empower the tobacco farmers in this State to protect themselves against the restraint of trade in a market which was controlled by a trust of tobacco manufacturers, and had been so controlled for many years. There is no other motive or purpose that can be suggested. The purpose of the combination of the farmers joined in this association does not appear to be, in the language of the Indiana decision, "Other than to secure a fair and adequate price for the growers' product. We think such acts could not be held to be in conflict with the morals of the time or to contravene any established interest of society. Public policy does not ask that those who till the soil shall take less than a fair return for their labor. Public policy safeguards society from oppression; it is not an instrument of oppression."

In *Ex parte Baldwin County Producers' Corporation,* 203 Ala., 345, decision filed 26 June, 1919, and rehearing denied in October, 1919, an association, authorized in almost the identical language of the statute in this State, was held valid and not obnoxious as being in restraint of trade, and a large number of decisions in other states are there cited in support of the ruling.

In *Citrus Fruit Association v. Yeoman,* 197 Pacific, 959, the Supreme Court of California affirmed a similar statute and the legality of a similar association, saying: "It will not be inferred without proof of the fact that an organization, the purposes of which appear to be legal and legitimate on its face, is actuated by a hidden design to operate in a way that is prohibited by law." This opinion was filed 16 May, 1921.

There are numerous other decisions to the same effect, among them, *R. R. v. Tobacco Co.,* 147 Ky., 22.

In *Castorland Milk Co. v. Schentz,* 179 N. Y. S., 131, a similar organization was held valid; and the same was done in *Milk Producers Association v. Armstrong,* 178 N. Y. S., 612.

Without cumbering this opinion with the citation of the numerous decisions to this effect, it may be said that similar associations for the purpose of protecting the producers against the depression of the market value of their products by great combinations of capital, with substantially the same provisions as in the charter of the plaintiff and its contract with its members, have been held valid, and that the courts will not interfere unless there is allegation and proof that the real object and effect is to procure prices beyond the real value.

The history of coöperative marketing associations is admirably set out in an article in the Columbia Law Review for February, 1923, in which it is pointed out that "from year to year the movement towards the coöperative marketing of farm products is assuming greater scope and greater economic importance. On the Pacific coast the large fruit growers' coöperatives have become by far the most important factors in the marketing of citrus fruit, raisins and grapes, prunes and apricots, and similar products. The annual turnover of coöperative associations in California alone is approximately $300,000,000. In the wheat and corn belts coöperative county grain elevators have been a familiar feature for a generation, and their importance is said to be growing. Coöperative creameries and cheese factories play a significant part in the economy of dairy farming in the middle west. Associations of potato growers, of truck gardeners, of growers of berries, apples, and vegetables for canning or direct consumption have been known for years. It was estimated that in 1920 that there were at least 14,000 farmers' buying and selling associations in the United States. In an earlier

estimate the annual business of coöperative marketing associations in the United States was placed at about $1,000,000,000."

The article then states that in the last two years, with financial assistance from the War Finance Committee under Congressional legislation, there has been a remarkable development of these coöperative associations in new fields. Giant marketing associations covering whole states, or even groups of states, have been organized with startling rapidity in the great cotton and tobacco growing states. In 1921 such associations were organized in Texas, Oklahoma, Mississippi, and Arizona to market cotton, and in Kentucky to market tobacco; and in 1922 cotton associations were organized in Arkansas, Alabama, Georgia, and North and South Carolina, and a tobacco association (the plaintiff in this case) covering North and South Carolina and Virginia, and other tobacco associations in Wisconsin, in the Connecticut Valley, and in Kentucky. Wheat growers' associations were organized in Oregon, Washington, Idaho, and Montana in 1921, and in Texas, Oklahoma, Kansas, and Nebraska in 1922, and it is estimated that such associations will handle during the present year 2,000,000 bales of cotton (worth at present prices $300,000,000), and more than 75 per cent of all the tobacco. Rice growers' associations, this same article states, are operating in California, Arkansas, Louisiana, and Texas, and the peanut growers' association in Virginia handles over a million dollars worth of peanuts annually. These associations have become necessary, not only as a matter of justice, but also as a matter of existence to the producers of the great staples of the country and as a protection against the gigantic combinations of capital which have been taking all the profits, or more, which should have gone to the producers of the great staple crops of the country, and to furnish a reasonable decent wage for the laborers in such industries.

The article concludes with pointing out that "the profit incentive is the mainspring of commerce, but is the antithesis of coöperation. The coöperative principle requires its services to be performed for the coöperating members by their appointed representatives and not by independent business units dealing at arm's length and striving for profit. It implies that the coöperating members are the real parties in interest in any transaction undertaken by their association. At no time can the association, as a corporate entity, have any interest in the marketed product adverse to the interest of the members for whose benefit the operations are conducted. Yet, so far as it is possible without sacrificing this essential characteristic, the association must adapt itself to the usages of trade. The merchant who buys its products, the banker who lends its money, properly insist that there be a responsible legal entity with which dealings can be had; that the property contributed by the members be subject to the hazards of the venture in which it has

been launched; that the officers of the association have the powers normal in the conduct of trade, and that no secret and unusual restrictions hamper their authority in ordinary business transactions. By conferring on the association legal title, with the powers of disposition which are incident to legal title, the members have successfully achieved this result. By insisting that this legal title exists for a special and limited purpose, for the benefit only of those who deal with the association in good faith and in the normal course of business, the rights of the members as the real parties in interest are preserved.

In *U. S. v. Steel Corporation,* 254 U. S., 417, it was held that when a court was asked to dissolve a corporation because in violation of the Sherman Anti-Trust Act, it must consider, not whether the corporation has the power to do so, but what it has done and is doing, for that act is directed against monopoly, and not against an expectation of it, and where the corporation did not achieve monopoly, and only has attempted to fix a protective schedule of prices, and has not been detrimental to the public interest, or proven to be in restraint of trade, it will not be held illegal.

In our own Reports there are many cases holding that restrictions, no matter how unlimited, may be imposed if reasonably necessary. In *Wooten v. Harris,* 153 N. C., 43, a contract was attacked upon the ground that it violated the statutory provisions against agreements not to buy or sell goods with the intention of preventing competition in selling or to fix the price or to prevent competition in buying; but the Court held that there being no proof that the contract was made in order "that enormous profits may be extorted at the expense of the public," and it being reasonably necessary for the parties, the contract was valid.

In *Bradshaw v. Millikin,* 173 N. C., 434, *Walker, J.,* adopted the English rule laid down by *Chief Justice Tindell* in *Horner v. Graves,* 7 Bing, 743, that when the restraint is such, only, as will afford a fair protection to the interest of the party in favor of whom it is given, and is not so large or extensive as to interfere with the interest of the public, it will be sustained.

We may well apply to this case the words of *Walker, J.,* in that case: "Without discussing the reasons upon which the rule is based, or endeavoring to fix a limit beyond which the parties may contract, it is sufficient to say that the terms of the present agreement are well within the principle under which such contracts are held to be valid. 9 Cyc., 525-533; *Faust v. Rohr,* 166 N. C., 187"; and in that same decision, page 434, he disposes of the objection raised by the defendant in this case against the provision for liquidated damages. We need not more fully

discuss it, as it does not directly arise in this appeal, but the rule is stated which has been laid down in all the cases that an agreement for liquidated damages will be held valid "in the absence of any evidence to show that the amount of damages claimed is unjust or oppressive, or that the amount claimed is disproportionate to the damages that would result from the breach or breaches of the several covenants of agreement." And it is further said in that case by *Walker, J.* (p. 436): "The mere insertion in the contract of a clause describing the sum to be recovered for a breach as liquidated damages, but which were not intended to be payable in return for the privilege of doing the acts forbidden by the contract, will not exclude the equitable remedy and is regarded as put there for the purpose of settling the damages if there should be a suit for recovery for breach." There may also be an action in the nature of a bill in equity, for what substantially would be a specific enforcement of the contract and restraining any further violation of it.

Shute v. Shute, 176 N. C., 462, in nowise militates against what is said in this case. That was not an association authorized by statute for the purpose of enabling producers to protect themselves against combinations to depress the price of their products, but was an agreement between cotton gin owners to divide the territory from which their patronage would come so as to prevent competition. In that case it is stated (at p. 464): "This was clearly against public interest, which is that these ginning plants shall be multiplied according to the need of the public, and shall not be restricted in number by an agreement between the parties in that line of business." It is clear that that decision in nowise conflicts with the principle sustained in this, that producers, under regulations prescribed by statute, which are presumed on their face to be valid, can organize for the purpose of marketing their crops in such a manner as to procure a fair price for the same and to protect themselves against loss by being forced to dump them on the market in such a manner that the prices are really fixed by a buyers trust.

Naturally the coöperative movement among the farmers has aroused the opposition of the financial combinations from whose unlimited power in fixing prices the farmers are seeking to free themselves, and also among some of the owners of the public warehouses, who are more or less allied with the big buyers, see *Gray v. Warehouse Co.*, 181 N. C., 166. Besides, the establishment of their own warehouses by the coöperative associations will curtail the profits of the public warehouse business.

The same contentions presented in this case have been also argued at this term in four other cases, more or less fully, to wit: The same plaintiff as herein *v. Z. A. Harrell*, from Edgecombe, appeal from

Daniels, J., and *v. Maynard Mangum,* from Wake, appeal from *Lyon, J.*; the same plaintiff *v. W. J. Ball,* from Wake, appeal from the same judge; and *Peanut Growers Association v. C. T. Harrell,* from Bertie, appeal from *Kerr, J.* (See cases filed without written opinion.) In these four cases substantially the same points were presented, and in each of them the judge below reached the same conclusion, and judgment will be entered in all five cases affirming the action of the court below.

Affirmed.

V. W. GENTRY v. SOUTHERN PUBLIC UTILITIES COMPANY ET AL.

(Filed 11 April, 1923.)

1. Evidence—Nonsuit—Motions—Waiver.

Where the defendant offers evidence after his motion to nonsuit upon the plaintiff's evidence has been refused, he waives his right under his first exception, and the entire evidence, under his second exception, taken at the close of all the evidence, will be considered on appeal.

2. Negligence—Evidence—Nonsuit—Questions for Jury—Trials.

Upon motion to dismiss upon the evidence as upon a nonsuit, the evidence will be considered in its most favorable light to the plaintiff, and where there is evidence that the plaintiff was injured while unloading wet and slippery poles from a car in the course of his employment for the defendant, under the direction or supervision of the defendant's vice-principal; that a skid for unloading had not been furnished, which was customary, and that sufficient help had not been provided for this work: *Held*, sufficient to take the case to the jury on the issues of defendant's actionable negligence; and the motion was properly refused.

3. Appeal and Error—Evidence—Objections and Exceptions—Waiver.

Where, among other things, the actionable negligence of the defendant depended upon whether it had furnished the plaintiff, its employee, sufficient help to unload poles from a railroad car, the error, if any (*Marshall v. Tel. Co.*, 181 N. C., 292), in permitting the plaintiff to testify that "they did not have sufficient help" is rendered harmless by the failure of the defendant to object to this evidence in response to questions afterwards asked by the court. *Hollifield v. Tel. Co.*, 172 N. C., 724, cited.

4. Instructions—Excerpts—Charge Interpreted as a Whole—Appeal and Error—Harmless Error.

An excerpt in a charge in a personal injury case is not prejudicial error to defendant for leaving out the principle of proximate cause, when it follows a portion thereof which puts the burden of proof on the plaintiff to establish the various elements necessary to obtain a verdict on the issue of defendant's actionable negligence, and charges the jury that defendant's actionable negligence, and defendant's breach of its legal duty must proximately have produced the injury.

GENTRY *v.* UTILITIES CO.

APPEAL by defendants from *Brock, J.*, at September Term, 1922, of FORSYTH.

Civil action to recover damages for an alleged negligent injury received by plaintiff while engaged in unloading some large chestnut poles from a flat car. There was evidence that the defendants failed to provide skids, as was customary, in unloading poles from cars of the kind in question; and that an insufficient number of men were trying to unload the poles on a rainy morning while they were slippery and difficult to handle, etc. The work was being done under the direction of the defendant, Will Sprinkle, who was a foreman or vice-principal of the Southern Public Utilities Company.

The usual issues of negligence, contributory negligence and damages were submitted to the jury and answered by them in favor of the plaintiff. The defendants appealed, assigning errors.

John C. Wallace and Hastings & Whicker for plaintiff.

Manly, Hendren & Womble and Swink, Clement & Hutchins for defendants.

STACY, J. On the argument, defendants insisted upon their exceptions to the refusal of the court to grant their motion for judgment as of nonsuit, made first at the close of the plaintiff's evidence, and renewed at the close of all the evidence. The first exception has been waived by the defendants. *Smith v. Pritchard,* 173 N. C., 720. They had the right to rely on the weakness of the plaintiff's evidence when he rested his case; but, having elected to offer testimony in their own behalf, they did so *cum onere*, and only their exception noted at the close of all the evidence may now be urged or considered. C. S., 567; *Blackman v. Woodmen,* 184 N. C., p. 77.

Without reciting the evidence, which is to be taken in its most favorable light for the plaintiff on a motion of this kind, we think his Honor was clearly correct in submitting the case to the jury.

The tenth and eleventh exceptions are directed to the following portion of the plaintiff's testimony:

"Q. Please state to the jury whether or not they had sufficient hands on the flat car to carry on the work?

"Objection; overruled; defendant excepts.

"A. No, sir; they didn't have sufficient help up there.

"Defendant moved to strike out the question and answer; motion overruled; defendant excepted.

"The Court: You say they did not provide sufficient help? A. Yes, sir.

"The Court: Why did they need other help? A. If I had another man to have held these poles, been another man up on the car with me, he could have held these poles while I loosened that pole."

Defendants contend that the admission of this evidence in the manner and form in which it was offered is violative of the rule announced in *Marshall v. Tel. Co.,* 181 N. C., 292; *Kerner v. R. R.,* 170 N. C., 94; *Lumber Co. v. R. R.,* 151 N. C., 221; *Marks v. Cotton Mills,* 135 N. C., 287, and other cases to like import; but it will be observed that that part of plaintiff's testimony given in response to inquiries from the court was admitted without objection, and this would seem to render the other portion harmless, even if it were objectionable in the first instance. *Tillett v. R. R.,* 166 N. C., 520; *Ledford v. Lumber Co.,* 183 N. C., 616. But speaking to a similar question in *Hollifield v. Tel. Co.,* 172 N. C., 724, *Walker, J.,* said: "The court did not err in allowing plaintiff to testify how the injury was received or what caused it, and why more hands were needed. He was merely stating facts within his own knowledge. In other words, he was stating what he had seen and the nature of which he understood by former experience. It was not merely an opinion. *Murdock v. R. R.,* 159 N. C., 131; *Britt v. R. R.,* 148 N. C., 37; and especially *Ives v. Lumber Co.,* 147 N. C., 306, which is similar in this respect." See, also, *Marshall v. Tel. Co.,* 181 N. C., 410.

The next exception relied on by defendants is the one directed to the following portion of his Honor's charge: "If the plaintiff has satisfied you by the evidence and by the greater weight thereof, that his injury was caused by the negligence of the defendants; that is, that the defendants failed to do what a reasonable and prudent man would have done under like circumstances with regard to unloading these poles, then you will answer the first issue 'Yes,' otherwise, you will answer it 'No.'"

This excerpt, standing alone, with no reference to proximate cause, might appear to be subject to some criticism; but, taken in connection with the whole charge, we do not think it could have left an erroneous impression with the jury. *White v. Realty Co.,* 182 N. C., 538. His Honor had previously and just immediately before charged adequately on the subject of actionable negligence, telling the jury that the burden was on the plaintiff to establish both a want of due care on the part of the defendants and a causal connection between this and the plaintiff's injury. The breach of a legal duty, owing by defendants to plaintiff, which proximately produced the injury is sufficient to establish liability in an action like the present. *Ramsbottom v. R. R.,* 138 N. C., 41; *Drum v. Miller,* 135 N. C., 215.

After a careful perusal of the entire record, we have discovered no exception which we apprehend should be held for reversible error.

No error.

JOHN BROOKS v. WILLIAM WOODRUFF.

(Filed 11 April, 1923.)

Boundaries—Grants—Location of Lands—Judge Finding Facts by Consent—Evidence—Appeal and Error.

The plaintiff claimed the *locus in quo* under the provisions of C. S., 7554, as vacant and unappropriated, and defendant filed his protest under those of C. S., 7557, the question of ownership depending upon the location of the land within the boundaries of the senior grant. Upon an agreed case the trial judge found the facts: *Held*, the boundaries of the grant were matters of law, and where the boundaries were, those of fact, and the findings of fact by the court, under the terms of the agreement, when supported by evidence, are conclusive on appeal.

APPEAL by plaintiff from *Finley, J.*, at September Term, 1922, of ALLEGHANY.

This was a proceeding of protest under the entry laws, C. S., 7557; and, from a judgment in favor of protestant, the enterer, or claimant, appealed.

T. C. Bowie for plaintiff.
Doughton & Higgins for defendant.

STACY, J. Brooks made entry to certain lands, under C. S., 7554, alleging the same to be vacant or unappropriated. Woodruff filed his protest, under C. S., 7557, claiming title to the land covered by the entry under a prior grant from the State. On the trial the rights of the parties were made to depend upon the true location of the lines and boundaries of Woodruff's grant. The case was heard on an agreed statement of facts, and his Honor, by consent, acting as judge and jury, found that Woodruff's grant called for the same land as that covered by the entry. This was a mooted question of fact, and we see no reason for disturbing his Honor's finding in favor of protestant and against the claimant, as it is supported by the evidence.

"What are the *termini* or boundaries of a grant or deed is a matter of law; where those boundaries or *termini* are is a matter of fact. It is the province of the court to declare the first, that of the jury to ascertain the second." *Henderson, J.*, in *Tatem v. Paine*, 11 N. C., 71. Here the court, by consent, taking the place of the jury, has found the facts against the claimant, and such finding is supported by competent evidence. The judgment, therefore, must be affirmed. *Lumber Co. v. Bernhardt*, 162 N. C., 460.

Affirmed.

LUCY SAUNDERS v. NORFOLK AND WESTERN RAILWAY COMPANY.

(Filed 11 April, 1923.)

Evidence—Res Ipsa Loquitur—Nonsuit.

In order for the doctrine of *res ipsa loquitur* to apply or make out a prima facie case of negligence against the defendant sufficient to take the case to the jury upon the issue, it is necessary to show that the thing causing the injury was under the defendant's management, or its servants', at the time; and where the evidence tends only to show that a window which another passenger had raised and left open fell upon the plaintiff's arm, then resting on the sill, and there is no evidence of a defect in the window or fasteners, a judgment as of nonsuit should be allowed.

APPEAL by defendant from *Connor, J.,* and a jury, at the October-November Term, 1922, of DURHAM.

The plaintiff was injured while a passenger on the defendant's train en route from Roxboro to Durham. After entering the coach she took a vacant seat by a window that was then open and placed her arm on the window sill. Just before the train reached Helena, which was eight miles from Roxboro, the window fell on her arm and injured it.

At the trial the plaintiff testified that she neither touched the window nor did anything else to cause it to fall, but she offered no evidence that the window or its catches were defective or that the window had been raised by any of the defendant's employees. The day was warm and nearly all the windows were open. There was no direct evidence of any defect or any act which caused the window to fall; but the trial judge instructed the jury as follows: "I instruct you that the fact that a window in a railroad car when properly secured after having been raised will not ordinarily fall, and the fact that this window did fall, is evidence to be submitted to you and to be considered by you in determining why the window fell. The very fact that the window fell when properly secured, either by properly adjusted fasteners, or it being raised to a proper distance it would not have fallen, coupled with the fact that the window in this instance did fall, if you find it fell, is evidence to be submitted to the jury, and it is for the jury to say whether or not the falling of the window was due to some default or failure on the part of the defendant to perform its duty with respect to this window, to a passenger."

At the close of the plaintiff's evidence and at the conclusion of all the evidence the defendant entered of record its motion to dismiss the action as in case of nonsuit. Each motion was denied. Upon the verdict judgment was rendered for the plaintiff and the defendant appealed.

R. H. Sykes and S. C. Brawley for plaintiff.
F. M. Rivinus and W. B. Guthrie for defendant.

ADAMS, J. In considering this appeal we observe an utter want of any direct proof that the window, or either of its bolts or safety catches, was defective or that it was raised by an employee of the defendant. Neither the height to which the sash was raised nor the condition of the catches nor whether the raised sash was secured by the catches is ascertained. So there is no definite evidence as to what caused the window to fall and no evidence of negligence except the bare fact that it fell. The plaintiff therefore seeks to maintain her action by applying to the evidence the rule *res ipsa loquitur*. The rule is clearly stated in *Scott v. The London Docks Co.*, 159 Eng. Rep., 665: "There must be reasonable evidence of negligence, but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care." But it is essential to show that the appliance, machinery, device, or other agency causing the injury is under the management of the defendant or his servants; and in applying the rule in actions against common carriers the courts are generally agreed that when a passenger is injured by machinery and appliances wholly under the carrier's control, this fact is sufficient prima facie to show negligence. 20 R. C. L., 188, sec. 157, and cases cited. Wigmore says that one of the considerations limiting the rule is that both inspection and user must have been, at the time of the injury, under the control of the party charged. Wigmore on Evidence, sec. 2509. In this respect the decisions of this Court cited in the plaintiff's brief may be differentiated from the case at bar. In all of them "the thing" was under the management or control of the defendant and not of the plaintiff; as, for example, a mail bag defectively hung or secured (*McCord v. R. R.*, 134 N. C., 53); the fall of an elevator (*Womble v. Grocery Co.*, 135 N. C., 474; *Stewart v. Carpet Co.*, 138 N. C., 61); defective machinery in a cotton mill (*Ross v. Cotton Mills*, 140 N. C., 115); negligence in unloading a car of coal (*Fitzgerald v. R. R.*, 141 N. C., 531); the defective roof of a coach (*Ridge v. R. R.*, 167 N. C., 510); a loose bolt in the aisle of a coach (*Lindsey v. R. R.*, 173 N. C., 391); fire escaping from a smokestack (*Matthis v. Johnson*, 180 N. C., 130); the explosion of gasoline stored in the defendant's warehouse (*Newton v. Texas Co.*, 180 N. C., 561); derailment of a train (*White v. Hines*, 182 N. C., 275); and the explosion of a boiler (*Harris v. Mangum*, 183 N. C., 235). But in the instant case the user at the time of the injury

was not under the immediate management of the defendant, but in control of the plaintiff. It is ordinarily left to the passenger to determine whether a window shall be open or closed, and the plaintiff saw fit as a matter of comfort or convenience not to interfere with the window as she found it when she entered the car. It is very probable that it was raised by the person who had last occupied the seat and had not made secure the safety device. Under these circumstances it is impossible to say whether the fall was attributable to any defect in the construction of the window or to the failure of the person who raised it to secure it in the usual way. It may be attributed to either with equal certainty, and the proximate cause of the injury cannot be determined. The falling of the sash was evidently an event which proceeded from an unknown cause and must be ascribed to accident or casualty.

The principle which we conceive to be apposite is stated by *Chief Justice Parsons* in *Boucher v. R. R.*, 79 At. (N. H.), 993, the facts in which were similar to those in this case. He said: "The plaintiff, having traveled safely in one of the defendants' trains from Nashua to Concord, while the train was at the latter station, changed her seat to one then vacated by another passenger beside an open window. Shortly after the train started from Concord the sash of the window fell upon her arm, causing the injury complained of. Aside from the fact that the sash fell after the train had been in motion about five minutes, there was no evidence of any defect in the window or its appliances . . . It is not common knowledge that windows in ordinary passenger coaches are opened only by railroad employees, and it could not therefore be found without evidence that the defendants left the window in an unsafe condition. It is not claimed that there was anything about the appearance of the open window which should have given notice to the trainmen of its insecurity. The defendants cannot be charged with fault for the improper manner in which the window was left, because the evidence leaves it uncertain whether the act to which carelessness may be imputed was theirs or that of a stranger. They cannot be charged upon the ground of a defective condition, because there is no evidence of any defect except the fall of the sash. Neither can it be assumed, in the absence of some evidence of defective condition, that such a condition caused whoever opened it to leave it so that it might fall. It is therefore unnecessary to attempt to determine the proximate cause of an injury under such circumstances . . . The carrier does not insure the passenger against injury from any cause during transportation, and there is no implied contract of safe carriage. The plaintiff's right of action is based on negligence, and negligence must be shown to authorize a recovery. If the accident may have been due to other causes than the carrier's negligence, the fact of the accident does not authorize the

inference of negligence; but, if the thing causing the injury is entirely within the control of the defendant, and in the ordinary course no accident would result if due care were exercised, the happening of such an accident may authorize an inference of negligence. 'The fact of an injury is not sufficient. It must be traced to the carrier. It must be shown to have proceeded from something under his control, or from some danger which, under the obligation of extraordinary care, it was his duty to anticipate and provide against.' 3 Thomp. Com. Neg. secs. 2754-2762; *Scott v. London Docks Co., supra:* 4 Wig. Ev., sec. 2509; 6 Cyc., 629. Upon this proposition the cases are now in entire accord. The inference of negligence arises, not from the fact of the injury, but from the circumstances under which it occurred. *Pennsylvania R. R. v. MacKinney,* 124 Pa. 462; 17 Atl., 14; 2 L. R. A., 820; 10 Am. St. Rep., 601; *Philadelphia, etc., R. R. v. Anderson,* 72 Md., 519; 20 Atl., 2; 2 L. R. A., 673, 20 Am. St. Rep. 483; and note 490; *Barnowsky v. Helson,* 89 Mich., 523; 50 N. W., 989; 15 L. R. A., 33; *Western Trans. Co. v. Downer,* 11 Wall., 129, 134; 20 L. Ed., 160. If it had been shown that the defendants' servants opened the window, the sash of which subsequently fell, the question would have been presented whether from its subsequent fall negligence could have been found. Assuming that upon the authorities such evidence would have made a case for the jury, none is here presented. The difficulty of the plaintiff's case is illustrated by two Massachusetts cases of injury to a passenger, in one of which the fall of a shade from an overhanging lamp was held to authorize a conclusion of negligence, while in the other the fall of a window did not. In the one case the thing causing the injury was exclusively under the defendants' control; in the other it was not. The two cases are *White v. Railroad,* 144 Mass., 404; 11 N. E., 552, and *Faulkner v. Railroad,* 187 Mass., 254; 72 N. E., 976."

The judgment and verdict will be set aside, and judgment will be entered on the defendant's motion dismissing the action as in case of nonsuit.

Reversed.

JULIAN ROBERTSON, BY HIS NEXT FRIEND, A. H. KING, v. J. N. ALDRIDGE AND JOHNNY ALDRIDGE.

(Filed 11 April, 1923.)

1. Negligence—Principal and Agent—Automobiles—Parent and Child.

The parent is not responsible for the negligence of his minor son in causing injury to another in driving his father's automobile, solely by reason of the relationship, for such liability must rest upon some principle of agency or employment, and no recovery can be had against the parent

when it is shown that at the time of the injury the car was being operated by the son for his own convenience, contrary to the parent's orders or without his consent, express or implied.

2. Same—Respondeat Superior.

Where the father owns an automobile for the pleasure and convenience of his family, a minor son living with him and using the car with the parent's consent, express or implied, at the time of an injury negligently inflicted by him on another, will be regarded as representing the parent in such use, and the parent may be held liable in damages for his son's actionable negligence under the principle of *respondeat superior.*

3. Same—Authority Implied.

Where the father owns an automobile for the use of his family, evidence that it was openly and habitually used by his minor son, for the son's own purposes, is sufficient for the finding by the jury that the son was operating the car by authority of the parent, and to hold the parent liable for an injury caused to another by the son's actionable negligence while driving the car on his own account.

4. Same—Evidence—Nonsuit.

Where there is evidence that the father had permitted the son to drive for his own pleasure an automobile kept by him for family use, and there is also evidence in behalf of the father that he had afterwards forbidden his son to do so, and the son had disobeyed his father and without his knowledge had taken out the car for his own purposes, and had negligently inflicted injury on another while driving it: *Held*, upon a motion to dismiss as of nonsuit, the evidence in favor of the father, the defendant in the action, as to his having forbidden his son to use the car on the occasion complained of, should be disregarded, and the question of the father's liability should be submitted to the jury.

5. Negligence—Automobile—Permissible Use—Recklessness—Knowledge—Parent and Child.

While the driving of an automobile is not regarded as inherently dangerous, the owner, parent or otherwise, cannot avoid liability for the actionable negligence of one to whom he intrusts his car, knowing or having reason to believe he is incompetent, reckless, or irresponsible, to an extent that makes a negligent injury probable, though the doctrine of *respondeat superior* is not presented.

6. Same—Evidence—Nonsuit—Questions for Jury—Trials.

Where there is evidence that the father, knowing that his minor son is reckless and irresponsible, directs him to take out his automobile to be washed, and without the father's knowledge the son goes to ride for his own pleasure, and negligently injures another: *Held*, a question for the jury to determine whether the father in entrusting the son with the car for this limited purpose under such circumstances was himself guilty of a negligent act, the proximate cause of the plaintiff's injury; and a motion to dismiss as of nonsuit is erroneously granted.

APPEAL by plaintiff from *Connor, J.*, and a jury, at September Term, 1922, ALAMANCE.

The action is against J. N. Aldridge and his minor son, Johnny Aldridge, and is instituted to recover damages for injuries sustained in a collision of automobiles due to the alleged negligence of defendant, Johnny Aldridge, in operating a car owned by his father, the codefendant, and with the alleged knowledge and consent and approval of the father.

Defendant Johnny Aldridge denied all allegations of negligence, and defendant J. N. Aldridge likewise denied the allegations of negligence, and denied that said Johnny Aldridge was operating the car with his consent and approval, but averred that the car was being driven at the time in disobedience of his explicit instructions. At the close of plaintiff's evidence, defendants offering no evidence, on motion, there was judgment of nonsuit as to the adult defendant, and thereupon plaintiff suffered a nonsuit as to the minor defendant, and excepted and appealed.

Coulter & Cooper for plaintiff.
Parker & Long for defendant.

HOKE, J. It appears by reasonable intendment from the admissions of the answers that the defendant Johnny Aldridge is the minor son of J. N. Aldridge, codefendant, living with his father, and the car operated by said minor at the time of the collision was owned by the father and used for the convenience and pleasure of the family. And there was evidence on the part of plaintiff tending to show that plaintiff, on the occasion in question, 24 December, 1920, was riding in a truck for delivery of laundry, owned by V. H. Lane, and used in his business, and which was being driven at the time by Wilton Lane, son of the owner, and over nineteen years of age. That they were on the concrete road going from Graham to Burlington, on the right side of the road, sitting in the seat of their machine and moving at about fifteen miles an hour. That there was a dirt road on right, a considerable drop (about a foot) from the concrete, and to right of that, a rock wall. That at the time and place of the occurrence, just opposite the home of a Mr. Andrews, there was a horse and buggy, the horse hitched to a post on the side of the road, and the buggy extending back about four feet onto the concrete, which at this place was 16 to 18 feet wide. That the truck was going on a down grade, and with wheels as near the right side of the concrete as they could be placed, and at a point just opposite the buggy defendant, Johnny Aldridge, driving the Ford sedan of his father from Burlington, towards Graham, at a rate of more than 25 miles per hour, coming from behind the buggy, ran the car over on plaintiff's side of the road, collided with the truck in which plaintiff was riding, knocked it around against the stone wall to the right, throwing plaintiff

out of the truck, breaking plaintiff's arm and causing other bruises and injuries from which he still suffers, etc.

Among other witnesses for plaintiff, V. H. Lane, owner of the truck and father of Wilton, on the examination in chief and his cross-examination testified as follows: "That he was not present at the time of the collision; that when witness' boy came in and said they had had an accident, they went over there and saw what it was and went over to get Mr. Aldridge to go over and show it to him so that there would be no misunderstanding; that when witness went in and saw him he was walking the floor, this way (illustrates) and said 'that boy will ruin me'; that he said 'Mr. Lane, you go and have that fixed and be as reasonable as you can, and I will pay it.' That Mr. Aldridge said his brother was coming home, and that he let the boy take the sedan out to wash it or have it washed, and that was the reason it was out; that he said he had stopped letting him use it; that he had had so much trouble with him.

"That Mr. Aldridge told witness he had stopped letting his boy use the machine, but that on this day he let him take it out to be washed; that he did not say anything about whether he had let him take it to Graham, and witness did not ask him; that Mr. Aldridge lives in Burlington and Burlington has several garages; that Mr. Aldridge lives up there and that on this occasion his brother was coming and he was going to let the boy take the machine to be washed."

Upon this, the admissions and evidence chiefly pertinent, the Court is of opinion that plaintiff is entitled to have his cause submitted to the jury. True, it is the recognized principle that a parent is not ordinarily responsible for the torts of a minor child, solely by reason of the relationship, and that generally liability will only be imputed on some principle of agency or employment. *Brittingham v. Stadiem,* 151 N. C., 299. Accordingly, it has been directly held with us in case of injury caused by negligent use of automobiles that no recovery can be sustained when it is made to appear that the machine was being operated by the minor at the time for his own convenience or pleasure, contrary to the parent's orders or without authority from the parent, either express or implied. *Linville v. Nissen,* 162 N. C., 96; *Bilyeu v. Beck,* 178 N. C., 481. But it is also held in our opinions by the great weight of authority that where a parent owns a car for the convenience and pleasure of the family, a minor child who is a member of the family, though using the car at the time for his own purposes with the parent's consent and approval, will be regarded as representing the parent in such use, and the question of liability for negligent injury may be considered and determined in that aspect. *Clark v. Sweany,* 176 N. C., 529; *S. c.,* 175 N. C., 280; *Griffin v. Russell,* 144 Ga., 275;

Hutchins v. Haffner, 63 Col., 365; *Stowe v. Morris,* 147 Ky., 386; *McNeal v. McKain,* 33 Okl., 449; *Birch v. Abercrombie,* 74 Washington, 486.

There is authority to the contrary, as appears in *Aiken, Admr., v. Page,* 287 Ill., 420, reported also in 5 A. L. R., 216. In the Illinois case, however, there is a strong dissenting opinion from judges *Cartwright* and *Farmer,* and in our view, as stated, the position of the dissenting judges is supported by the better reason. And from this it follows, we think, that when it is made to appear that a car owned by a parent for family use is openly and habitually used by a minor child, a member of the family, such conditions will constitute evidence permitting the reasonable inference that the car is being operated by authority of the parent and for the purposes for which it was obtained. *Birch v. Abercrombie, supra; Williams v. May,* 173 N. C., 78; *Taylor v. Stewart,* 172 N. C., 203.

In view of these principles and considering the evidence in accord with the rule, uniformly prevailing, that on a motion of this character, the evidence which makes in favor of plaintiff shall be accepted as true and construed in the light most favorable to him, there are facts tending to show that J. N. Aldridge was the owner of a Ford sedan for the convenience and pleasure of the family. That the son, a minor, and a member of the family had been entrusted with the car on this occasion, and there is evidence permitting the inference that he had been in the habit of running the car. True, the father also said that he had stopped letting the son use the car, but the jury are not compelled to accept this statement which makes for the defense, nor does it clearly appear when this alleged restriction had been made nor what was the extent of the authority to the son given on the afternoon in question, and under the rule prevailing in such cases, these doubts should by no means be resolved against the plaintiff, and on the record he is entitled to go to the jury under the principles of *respondeat superior,* see *Duncan v. Overton,* 182 N. C., 80.

Again, while our decisions hold that automobiles are not to be regarded as inherently dangerous, requiring questions of liability to be determined in that view, it is the rule approved by well considered authority and recognized in this jurisdiction that when an owner, parent or other, entrusts his car to one whom he knows or has every reason to believe is incompetent, or reckless and irresponsible, to an extent that makes a negligent injury probable, such owner may be held liable, though the doctrine of *respondeat superior* is not presented. *Gardner v. Solomon,* 200 Ala., 115, a position recognized and approved by this Court in the recent case of *Tyree v. Tudor,* 183 N. C., 340.

In the evidence of the witness V. H. Lane appears the statement that when the witness went to see J. N. Aldridge about the occurrence, the latter appeared greatly concerned, offered to pay the damage to the extent that was reasonable. That he had allowed his son to take the car out that afternoon to have it washed. That he had stopped letting the son use the car, he had had so much trouble with him. If this evidence should be accepted by the jury, the cause should be further submitted whether the father, in entrusting the son with the car even for a limited purpose, was himself guilty of a negligent act, the proximate cause of plaintiff's injury.

This will be certified to the end that the judgment and order of nonsuit be set aside as to both defendants and the cause submitted to the jury on appropriate and determinative issues.

Reversed.

THE PEOPLES NATIONAL BANK v. J. D. WAGGONER AND G. D. HILL, TRADING AS WAGGONER & HILL, AND J. S. BARR.

(Filed 11 April, 1923.)

1. Equity—Fraud—Following of Funds.

When a man's property has been obtained from him by actionable fraud or covin, the owner can follow and recover it from the wrongdoer as long as he can identify or trace it; and the right attaches not only to the wrongdoer himself, but to any one to whom the property has been transferred otherwise than in good faith and for a valuable consideration, and this applies not only to specific property, but to money and choses in action.

2. Same—Trusts—Implied Trusts.

The right of the owner of property to follow the property obtained from him by the actionable fraud of another is, upon the equitable doctrine, which in proper instances impresses a trust upon the property and protects and preserves the same for the owner's benefit, to the extent of his interest therein.

3. Same—Admixture of Goods.

Where one has obtained property from the owner by actionable fraud and covin, the application of the principle by which the owner may follow it and impress a trust thereon in his favor in its converted state is not affected by the fact that the person perpetrating the fraud has so commingled it with his own property that it may not be distinguished, for in such case the equity attaches to the whole property, it being required that the one who had perpetrated the fraud establish the identity of his own property from the other upon which the trust attaches, for otherwise the loss, if any, must fall upon him.

4. Same—Receivers.

Where equity will impress a trust upon property in the hands of one who has obtained it by fraud or covin, and the property or fund is threatened both by his fraud and insolvency, the principles of equity will justify and call for the appointment of a receiver to take charge of the property and conserve it pending the litigation. C. S., 860.

5. Same—Banks and Banking—Employer and Employee—Collusion—False Entries.

A trading partnership secretly colluded with one employed at a bank as a bookkeeper for him to pay their checks when they had no balance therein and falsify the entries on the books to show a credit, and upon money so obtained from time to time the concern conducted its business, after having paid in a small capital at the start. Upon application of the bank for a receivership, and this condition appearing by affidavit, and being established: *Held*, the property of the partnership, consisting of merchandise, choses in action, etc., was impressed with a trust in the bank's favor, arising from the fraud practiced upon it, and the application for the receiver for the entire property was properly granted in the absence of the proof by the defendants of the identity of their separate property which they had commingled with the other.

APPEAL by defendant from *Brock, J.*, at November Term, 1922, of FORSYTH.

Upon the affidavits and evidence, and pleadings submitted, and in response to a request thereto from defendants Waggoner & Hill, the court made the following as the findings of fact:

1. That soon after 1 January, 1922, the defendants, J. D. Waggoner and G. D. Hill, formed a copartnership under the firm name of Waggoner & Hill to engage in the business of livestock dealers, and the contribution of the partners to the capital stock of the copartnership consisted in a lot of mules to the value of $3,000, which had not been paid for by J. D. Waggoner; and approximately $2,000 in cash, an automobile, and a debt due G. D. Hill for services from J. D. Waggoner, which was valued at about $1,000, making the total capital of the copartnership of $6,000; that checks were paid on 10 January of $1,500 and 28 January of $1,500, 1922, by the firm, which represented the purchase price of the mules put into the firm by J. D. Waggoner.

2. That defendant J. S. Barr was an employee of the plaintiff bank as a bookkeeper, and kept the individual ledger in which was kept the account of Waggoner & Hill, and at the request of Waggoner & Hill the said J. S. Barr was employed by them as their bookkeeper and confidential agent, keeping their books at night and his leisure time from his duties at the bank; that this employment by Waggoner & Hill was without the knowledge or consent of the plaintiff bank.

3. That Waggoner & Hill, in the conduct of their business of purchasing livestock, drew checks upon the plaintiff bank for large sums

of money which the defendant J. S. Barr cashed when the said Waggoner & Hill had no money to their credit with the plaintiff, until on 9 March, 1922, their overdraft with the plaintiff amounted to $4,082.63; that J. S. Barr informed them that he had cashed checks for them with the plaintiff when they had no money to their credit and insisted and begged them to make the overdraft good; that the defendants Waggoner & Hill promised to do so, but failed and neglected to comply with the promise, and J. S. Barr informed them that he would be compelled to make a false entry on his books so that the officials of the plaintiff would not discover the abstraction of the plaintiff's money by means of his paying the checks of Waggoner & Hill when there was no money to their credit; that the defendant Waggoner & Hill told J. S. Barr not to turn down their checks as it would ruin them and to handle it the best he could so it would not be found out, and promised to get up the money and make the overdraft good. That on said 9 March, 1922, the overdraft of $4,082.63 was transferred from the debit side of the account to the credit side of the account, thereby making a difference in the real status of the account of double this amount and concealing thereby the abstraction of plaintiff's money.

4. That subsequent to 9 March, 1922, the defendants Waggoner & Hill continued to draw checks, well knowing at the time that there was no money to their credit with the plaintiff with which to pay said checks, and took up the fictitious credit, and thereafter, on 23 August, 1922, another overdraft arising from the cashing of checks for the livestock and the operating expenses of the business until said overdraft amounted to $1,863.11, which was transferred by J. S. Barr with the full knowledge and assent of the defendants, Waggoner & Hill from an overdraft to a credit balance on said account; that by reason of the false entries on 9 March, 1922, and 23 August, 1922, the defendant Waggoner & Hill abstracted funds from the bank by means of such false entries aggregating the sum of $11,891.48, which sum was used in their business as livestock dealers in the purchase of livestock which was commingled with their other property.

5. That the defendants Waggoner & Hill were purchasing mules from Lummis, Coggin & Company from Atlanta for purpose of resale in their business as livestock dealers; that in the purchase of the mules the defendants Waggoner & Hill gave to Lummis, Coggin & Company the checks which appear in paragraph six of the complaint; that said checks were paid out of the funds of the plaintiff without its authority by J. S. Barr and which payment with the full knowledge of Waggoner & Hill was concealed from the plaintiff; that the proceeds of the checks which were paid as aforesaid were used in the purchase of mules which went into the business of Waggoner & Hill and were commingled with their other property.

6. That in the sale of the livestock purchased with plaintiff's money secured from it as herein set out, the defendants Waggoner & Hill secured upon the resale of said livestock to various and sundry persons, notes, liens, open accounts and chattel mortgages of between $20,000 and $30,000; that the business of Waggoner & Hill has been almost entirely operated upon and by means of the money fraudulently obtained by reason of the wrongful and unlawful acts of J. S. Barr and of themselves; that the notes, mortgages, liens and open accounts are in the possession of the defendants Waggoner & Hill and said evidences of indebtedness are now maturing during the months of October, November and December, 1922, and January, 1923, and that said notes, mortgages, open accounts, liens, etc., represent the purchase price of the livestock from the purchasers received upon a resale of the property so fraudulently acquired.

7. That the defendants Waggoner & Hill and J. S. Barr are insolvent. That from an inspection of the original checks paid by the plaintiff bank under the circumstances as aforesaid, and which went into the livestock business of the defendants Waggoner & Hill, amounted to $79,829.41, and the total amount of the deposits made by Waggoner & Hill was $49,046 up to the time the account was closed out; that if the defendants Waggoner & Hill are permitted to sell the livestock on hand and to collect the notes, liens, accounts, mortgages, etc., arising from the sale of the livestock purchased by them with plaintiff's money secured as aforesaid, the plaintiff will suffer irreparable loss and damage.

8. That the livestock purchased with plaintiff's money so fraudulently obtained by the defendants Waggoner & Hill was commingled with the livestock of the defendants Waggoner & Hill, and the notes, mortgages, liens, accounts, etc., secured upon the resale of said livestock as aforesaid have been commingled with the property and effects of the defendants Waggoner & Hill in their livestock business until at the present time such small amount, if any there was, originally put in the business by Waggoner & Hill cannot be distinguished or separated from the general funds of the business of Waggoner & Hill, and that the commingling of the money and property as aforesaid which was so fraudulently obtained, was done with the full knowledge of Waggoner & Hill.

And thereupon confirmed and continued the appointment of the receiver as set forth in the record. From this order defendants Waggoner & Hill, having duly excepted, appealed to this Court.

Swink, Clement & Hutchins, and O. T. Efird for plaintiff.
Parrish & Deal and McMichael, Johnson & McMichael for defendants.

HOKE, J. In *Mfg. Co. v. Summers,* 143 N. C., 102, it was held: "When a man's property has been obtained from him by actionable fraud or covin, the owner can follow and recover it from the wrongdoer as long as he can identify or trace it; and the right attaches not only to the wrong-doer himself, but to any one to whom the property has been transferred otherwise than in good faith and for valuable consideration; and this applies not only to specific property, but to money and choses in action."

This in the main is an equitable doctrine which, on the facts of the present record and like cases, is made effective by impressing a trust upon the property and protecting and applying same for plaintiff's benefit to the extent of his interest therein, and is very generally recognized in the decided cases and approved text books on the subject. *Sumner v. Staton,* 151 N. C., 198; *Edwards v. Culbertson,* 111 N. C., 342; *Avery v. Stewart,* 136 N. C., 426; *Baltimore National Bank v. Insurance Co.,* 104 U. S., 54; *Newton v. Porter,* 69 N. Y., 133; Pomeroy's Equity Jurisprudence, sec. 1053; 39 Cyc., 172. In *Culbertson's case, Shepherd, J.,* delivering the opinion, quotes with approval from Pomeroy's Equity Jurisprudence as follows:

"In general, whenever the legal title to property, real or personal, has been obtained through actual fraud, misrepresentations, concealments, or through undue influence, duress, taking advantage of one's weakness or necessities, or through any other similar means or under any other similar circumstances which render it unconscientious for the holder of the legal title to retain and enjoy the beneficial interest, equity impresses a constructive trust on the property thus acquired in favor of the one who is truly and equitably entitled to the same, although he may never perhaps have had any legal estate therein; and a court of equity has jurisdiction to reach the property either in the hands of the original wrong-doer, or in the hands of any subsequent holder, until a purchaser of it in good faith and without notice acquires a higher right, and takes the poperty relieved from the trust."

And in *Newton v. Porter, supra, Judge Andrews,* speaking to the question said: "It is immaterial in what way the change has been made, whether money has been laid out in land or land laid out in money, or how the legal title may be placed. Equity only stops the pursuit when the means of ascertainment fail, or the rights of bona fide purchasers for value and without notice of the trust have intervened." Nor is the position in the present instance materially affected by the suggestion made in behalf of the appellants that the defendants, members of the partnership, had originally invested six or seven thousand dollars in the business, and which, or a part of which, may be represented in the stock, notes, mortgages, etc., the subject of the present litigation, the

approved principle being that if, in cases like the present, the holder of the legal title has so mingled his own with the beneficiaries' property that they can no longer be distinguished, the trust will be declared upon the entire fund and the loss, if any, must fall on the perpetrators of the wrong. *Lance v. Butler,* 135 N. C., 419; *Wells v. Batts,* 112 N. C., 291; *Walburn & Co. v. Timmon & Nissen,* 55 S. S., 456; *Bank v. Ins. Co.,* 104 U. S., 54; 30 Cyc., 536-538, and cases cited.

In this last work, the position is correctly stated as follows: "Where a trustee so mingles the trust fund or property with his own or so invests it in property together with his own that the trust fund or property cannot be separated or the amount of each ascertained, the whole mixed fund or property becomes subject to the trust except so far as the trustee may be able to distinguish or separate his own, and the burden of making the separation or distinction is on the trustee or his representative, and the rule applies as long as any portion of the fund or property with which the trust fund or property can be traced remains.

Applying these principles, the facts as found by the court showing that the defendant partnership having corrupted the bookkeeper of plaintiff bank and induced him to purloin its money for their benefit by making false entries in his books, which has been to a large amount, invested in the property, the subject-matter of this litigation, the law as stated will impress a trust upon the property for plaintiff's benefit. And it appearing further that the safety of the fund is threatened both by the fraud and insolvency of defendants, holders of the legal title, the case comes directly within the equitable principle embodied in our statute on the subject, C. S., 860, and which justifies and calls for the appointment of a receiver to take charge of the property and conserve same pending the litigation. The section referred to, in subsection 1, provides as follows: "A receiver may be appointed, before judgment, on the application of either party, when he establishes an apparent right to property which is the subject of the action and in the possession of an adverse party, and the property or its rents and profits are in danger of being lost, or materially injured or impaired; except in cases where judgment upon failure to answer may be had on application to the court." See numerous authorities cited in the section.

There is no error and the judgment of the Superior Court is

Affirmed.

A. A. JONES v. COUNTY BOARD OF EDUCATION OF GUILFORD COUNTY.

(Filed 11 April, 1923.)

1. Schools — School Districts — Taxation—Bonds—Elections—Necessary Expenses—Constitutional Law.

A school district comes within the provisions of our State Constitution, Art. VII, sec. 7, requiring a majority vote of the qualified voters therein for it to "contract any debt, pledge its faith, or loan its credit," etc., except for necessary expenses.

2. Same.

The building and maintenance of schoolhouses by a school district is not for necessary expenses within the meaning of the Constitution, Art. VII, sec. 7. The construction of Art. VIII, sec. 3, State Constitution, requiring that public schools shall be maintained at least six months in every year, is not involved in case.

3. Statutes—Interpretation—Several Sections.

A statute should be construed as a whole to give effect to all of the expressions therein used, regarding none of them as surplusage when they can reasonably be given effect, and the fact that the act consists of several sections is immaterial in the application of the rule of construction.

4. Same—Schools—School Districts—Taxation—Bonds.

Where the first section of a statute merely prescribes the means of ascertaining the will of the voters in a school district upon the question of borrowing money or issuing bonds for the erection and maintenance of school buildings within the district, and in other sections are found expressions clearly indicating that the borrowing of money and the issuance of bonds was intended, the intent of the act must be gathered from the expressions found in its various sections, and bonds issued thereunder with the approval of the voters of the district at an election duly held, upon full notice, are valid obligations of the district issuing them accordingly; and, also, *Held*, that a later reënactment of this statute cured its defects, if any therein existed.

5. Same—Implied Powers.

A provision of a statute authorizing a school district to borrow money for public school purposes implies the power incidental to the execution of the proper evidence of indebtedness therefor, such as the giving of the corporate notes or the issuance of its bonds, with the power to levy the taxes necessary to pay the bonds, principal, and interest.

6. Same—Constitutional Law—Benefits.

The legislative authority given to a school district to borrow money implies the power to raise money for the public use on the pledge of the public credit for the designated purposes, and it may be exercised to meet either present or anticipated expenses and liabilities for those purposes, and also to issue in return for borrowed money its obligations in any appropriate form, whether bonds, bills, or notes; and *Held*, the statute under construction on this appeal did not limit the sum authorized to be borrowed to that to be raised by the annual tax in any one year.

7. Same.

Where a school district has been established coterminous with the boundary of a county, excepting a city and a district therefrom, and under legislative authority the county commissioners at the request of the county board of education have called an election, under statutory provisions, to pass upon the question of borrowing money and issuing bonds for public school buildings and school maintenance, etc., to be paid out of funds to be derived from special taxes within the school district, and at the election lawfully held a majority of the qualified voters in the school district have approved of the question submitted to them: *Held*, the statute under which the tax is to be levied is not unconstitutional as a taxing of the territory of the county excepted from the school district for the sole benefit of the territory included therein, but only a taxing of that part of the county within the school district to be advantaged, through the agency of the county board of education.

8. Statutes — Uncertainty — Schools—School Districts—Taxation—Automatic Decrease in Tax Rates—Appeal and Error.

Where a statute authorizes a public school district to borrow money and pledge its credit for the erection of schoolhouses and the maintenance of its schools, its validity is not affected for uncertainty by a proviso that the tax rate shall automatically decrease upon the increase of valuation of property within the district; and the contingency not having arisen in this case, *it is held* that a discussion of the appellant's exception is unnecessary at this time.

APPEAL by plaintiff from *Stack, J.*, at chambers. From GUILFORD.

Controversy without action upon an agreed statement of facts, the substance of which is herein set out.

On 21 February, 1921, the General Assembly enacted chapter 131 of the Public-Local Laws of 1921, entitled "An act to equalize school advantages in Guilford County, North Carolina." This act was amended on 5 March, 1921 (Public-Local Laws, ch. 375), by authorizing the county board of education (if the original act should be approved) to appoint two additional members of said board, and again at the Extra Session 1921 of the General Assembly by changing the form of the ballot prescribed in section one and by increasing the maximum amount of the indebtedness to be incurred from $250,000 to $500,000. On 6 March, 1922, at the request of the county board of education the board of county commissioners called an election and submitted to the qualified voters in the designated territory the question of levying and annually collecting in said territory a special tax not to exceed ten cents on property valued at $100 for building purposes and not to exceed fifteen cents on a like valuation for school maintenance, in addition to the school taxes then authorized, except as otherwise provided in the act. The election was held on 25 April, 1922, and a majority of the qualified voters voted "For abolishing all local school taxes and adopting a county-wide equalizing tax," in accordance with the provisions of the

original act and the amendments thereto. Notice of the election was given as follows:

The General Assembly of North Carolina having ratified, on 21 February, 1921, "An act to equalize school advantages in Guilford County, North Carolina," the same having been amended by an act ratified 14 December, 1921, and the county board of education, in accordance with section one of said act, and amendments thereto, having made written request for an election to be held, it is ordered that the election be held on Tuesday, 25 April, 1922, to ascertain the will of the people whether all special school taxes in Guilford County outside of the city of Greensboro and the township of High Point be repealed, and that an additional tax of not exceeding ten cents on the $100 valuation of property for building purposes, and not exceeding 15 cents on the $100 valuation of property for school maintenance be annually levied and collected in all of Guilford County, with the exception of the city of Greensboro and the township of High Point. That at said election those who favor equalizing school advantages in Guilford County by abolishing all local taxes and substituting in lieu thereof the county-wide tax shall vote a ballot on which shall be written or printed the words: "For abolishing all local school taxes and adopting a county-wide equalizing tax," and those opposed a ballot on which shall be written or printed the words: "Against abolishing all local school taxes and adopting a county-wide equalizing tax."

Chapter 375, Public-Local Laws of 1921 and chapter 38 of Public-Local Laws, Extra Session of 1921, were not enacted in the matter provided by Art. II, sec. 14, of the Constitution of North Carolina, but on 26 February, 1923, the General Assembly enacted and ratified an act which is entitled "An act to reënact an act entitled 'An act to equalize school advantages in Guilford County, North Carolina,' ratified 21 February, 1921, and the acts amendatory thereof, and also to validate proceedings taken under said acts, and to provide for the issuance of obligations to evidence indebtedness authorized by said acts and proceedings." This act in express terms reënacts chapter 131, Public-Local Laws of 1921, and the amendments thereto, and ratifies and validates the election held on 25 April, 1922. It also provides that when the county board of education shall borrow money under the provisions of section seven and the amendments the board may issue in its corporate name negotiable bonds, notes, or other evidences of indebtedness and to renew or fund such obligations from time to time by issuing other obligations of like character, the total amount not to exceed $500,000. Provision is made for the form and denomination of such obligations, the payment of the interest thereon, the manner of sale, the funds out of which payment shall be made, and the tax to be levied. Section 4 is as follows: "A majority of the qualified voters in

the territory subject to the said special tax, having, at the said election held on 25 April, 1922, approved by statutes hereby reënacted, including the provisions of said statutes authorizing the borrowing of money for erecting and equipping school buildings, no further election shall be necessary to enable the county board of education of Guilford County to issue obligations as herein provided."

The defendants, acting as the county board of education of Guilford County, are about to borrow $500,000 and issue serial bonds in the corporate name of said board of education in said amount, pursuant to section 7 of said chapter 131 of the Public-Local Laws of 1921, regular session, as amended by said chapter 38 of the Public-Local Laws of 1921, Extra Session, and also pursuant to the said vote of the people and the said act ratified 26 February, 1923; and they will do so unless restrained by an order of this Court, and the said bonds will be issued in the present year, and will be made payable in annual installments beginning one year after the date of issue of the bonds and ending not exceeding thirty years after said date of issue.

The present assessed valuation of taxable property upon which the special tax of not exceeding ten cents on the $100 valuation of property for building purposes is authorized by section 1 of said chapter 131 of the Public-Local Laws of 1921, regular session, to be levied, is between $60,000,000 and $70,000,000, and the said tax for the present year will therefore amount to between $60,000 and $70,000. On 21 February, 1921, when said act was enacted and took effect, the assessed valuation of said taxable property was substantially the same as said present assessed valuation.

The action was brought to enjoin the defendant from issuing the proposed bonds. His Honor refused the plaintiff's motion for an injunction and adjudged that the bonds would be valid obligations when issued pursuant to the several acts referred to herein. The plaintiff excepted and appealed.

R. M. Robinson for the plaintiff.
John N. Wilson for the defendant.

ADAMS, J. The plaintiff contends that the defendant has no legal right either to borrow money or to issue bonds for the purposes stated in the case agreed and assigns in support of his position four distinct grounds, each of which requires investigation.

1. His first proposition is this: At the election held on 25 April, 1922, the vote was confined to the question of levying a tax and did not include that of borrowing money or issuing bonds, and hence both borrowing the money and issuing the bonds are inhibited by the organic

law. The constitutional provision relied on as the basis of the proposition is as follows: "No county, city, town, or other municipal corporation shall contract any debt, pledge its faith or loan its credit, nor shall any tax be levied or collected by any officers of the same except for the necessary expenses thereof, unless by a vote of the majority of the qualified voters therein." Const., Art. VII, sec. 7.

It has been held that a taxing district of the character described is within this constitutional provision and that the subject of the proposed tax is not a necessary expense; in fact, the defendant does not contend that it is. The requirement that public schools shall be maintained at least six months in every year is not involved. Const., Art. VIII, sec. 3; *Williams v. Comrs.*, 176 N. C., 554; *Bennett v. Comrs.*, 173 N. C., 625; *Ellis v. Trustees,* 156 N. C., 10. The plaintiff's proposition must therefore be dealt with upon the assumption that the proposed indebtedness is not to be incurred for an expense which is necessary within the meaning of the constitutional inhibition.

It is true, as contended by the plaintiff, that the first section of the original act merely prescribes the means of ascertaining the will of the voters and does not in express terms embrace the question either of borrowing money or issuing bonds; but in several other sections are found the two expressions "If a majority of the qualified voters favor the additional school tax" and "If this act is approved by a majority of the qualified voters." These expressions are not to be treated as surplusage, but on the contrary as importing special significance. In order to discover and give effect to the legislative intent we must consider the act as a whole, having due regard to each of its express provisions; for there is no presumption that any provision is useless or redundant. That the act consists of several sections is altogether immaterial on the question of its unity. "The construction of a statute can ordinarily be in no wise affected by the fact that it is subdivided into sections or titles. A statute is passed as a whole and not in parts or sections and is animated by one general purpose or intent. Consequently the several parts or sections of an act are to be construed in connection with every other part or section and all are to be considered as parts of a connected whole and harmonized, if possible, so as to aid in giving effect to the intention of the lawmakers." 25 R. C. L., 1009, sec. 248.

The only way in which the will of the voters was to be ascertained is found in the first section of the act referred to, and in this way and by this method a majority of the qualified voters manifested their approval, not only of the proposed additional tax, but of all the provisions of the act which were necessary to accomplish the ultimate legislative purpose. For not only as a public-local law, but as a law particularly mentioned in the published notice of the election, did the

original act impart to every voter constructive notice of all its provisions.

We must therefore assume that those who voted in the election knew that approval of the act would be equivalent to authorizing the defendant with the sanction of the Legislature to borrow money for the purposes set out in section seven; and the power to borrow money implies the power incidentally to execute the proper evidence of the indebtedness so incurred. In *Charlotte v. Shepard*, 122 N. C., 602, it is held that where a municipal corporation by authority of the Legislature and the approval of a majority of the qualified voters acquires the right to create a debt and issue bonds, it is clothed with power to levy the taxes necessary to pay the bonds and the accruing interest. There the Court says: "When such corporation has thus acquired the right to create the debt and to issue the bonds, this power carries with it the power to levy the taxes necessary to pay said bonds and the accruing interest thereon. *Rawls County Court v. U. S.*, 105 U. S., 733; *U. S. v. New Orleans*, 98 U. S., 381. It is admitted that these cases are direct authority for this position, if there is no public law to the contrary, but it is suggested that Art. VII, sec. 7 of the Constitution, provides otherwise, and therefore the doctrine declared in these cases does not apply, and that it is necessary that the power to tax should be expressly granted in the legislative act. We do not think Art. VII, sec. 7, nor any other provision of the Constitution, contains any such requirement as this. If it did, we would feel bound by it, no matter what might be held to be the general rule in other jurisdictions. That clause of Art. VII, sec. 7 of the Constitution, if intended to have any separate and independent meaning, was only intended to apply to such indebtedness as had not been submitted to the vote of the people."

In *Slocomb v. Fayetteville*, 125 N. C., 362, it appears that the defendant was authorized to create a municipal debt, but was not expressly empowered to levy the tax necessary to pay the bonds; and it was held on appeal that if a municipal corporation has the power to create a debt it has also the right to levy the necessary tax, because such right attaches by necessary implication. If the right to create a debt carries with it the power to levy a tax to provide for payment, *a fortiori* does the right to levy a tax with which to pay back borrowed money essentially imply the right to issue the proper evidence of such obligation. Indeed, there are decisions which uphold the principle that a municipal corporation which has contracted or is authorized to contract a valid debt is empowered also to issue bonds as evidence of such debt. *Bennett v. Comrs., supra; Comrs. v. Webb*, 148 N. C., 120; *McCless v. Meekins*, 117 N. C., 34; *Tucker v. Raleigh*, 75 N. C., 267; *Parvin v. Comrs.*, 177 N. C., 508; *Riddle v. Cumberland*, 180 N. C., 321.

The fact that the indebtedness may have been incurred for a necessary expense does not affect the relevancy of the principle discussed in these decisions, because in the instant case there is no controversy as to the regularity of the election or the proper passage of the act under which it was held.

We have not referred to the act ratified 26 February, 1920, because in our judgment the defendant without its aid had the legal right to issue the bonds, but by this act the former laws are reënacted and the defendant is given express power to issue the necessary bonds in its corporate name. In this way the right is doubly assured. The plaintiff, as we understand, does not question the power of the Legislature to enact this statute. *Belo v. Comrs.,* 76 N. C., 489; *Anderson v. Wilkins,* 142 N. C., 154; *Edwards v. Comrs.,* 183 N. C., 58.

2. The plaintiff argues, in the second place, that even if the approval of the proposed tax implies the power to borrow money the defendant cannot borrow in any one year any amount in excess of that which may be raised by the annual tax. He contends that the words "borrow money" are generally understood to refer to short-term loans in anticipation of current revenue as distinguished from long-term bond issues; but we do not think they are limited to this sense. They imply the power to raise money for the public use on the pledge of the public credit, and such power may be exercised to meet either present or anticipated expenses and liabilities. As held in the Legal Tender Cases it may be exercised to issue in return for borrowed money obligations in any appropriate form, whether bonds, bills, or notes. 110 U. S., 421. The right to borrow money as applied to a municipal corporation is a power to create indebtedness and procure for its payment funds from others to be paid at a future date. *Orchard v. School District,* 14 Neb., 378. It is evidently in this sense that the term is used in section seven, for the amended proviso obviously contemplates the possibility of an indebtedness very much in excess of the amount to be derived from any tax which may be annually levied and collected.

3. The plaintiff next says that the bonds, if issued in the name of the defendant, would in effect become the obligations of the county and that the General Assembly could not authorize the creation of a county obligation for the benefit of a taxing district which does not include the entire county. In support of the proposition he cites *Comrs. v. Boring,* 175 N. C., 105, and *Comrs. v. Lacy,* 174 N. C., 141.

The difference between these cases is merely formal and in only one or two phases to which we shall advert are they apparently relevant to the question here presented. In substance they announce the doctrine that the Legislature is without power to require a county to give its binding obligation for the payment of money on the application and

vote of a township or road district for the construction and maintenance of the roads of such township or district, since it is not within the legislative power to tax one community or local taxing district for the exclusive benefit of another. And in *Boring's case, Walker, J.*, adopts a quotation from Cooley on Taxation to the effect that the taxing district through which the tax is to be apportioned must be the district which is to be benefited by its collection and expenditure. This is exactly what the act of 1921 provides. The taxing district is not coterminous with the county and is not a political entity. It was provided therefore that the obligations of the district should be issued in the corporate name of the defendant and that they should be paid out of funds to be derived from the tax levied only in the district for building purposes or out of the special annual tax for building purposes authorized by the original act and the amendments. This is the only way devised for paying back the money to be borrowed, and we find nothing in the record which justifies the conclusion that the bonds when issued will become the general or unrestricted obligations of the defendant or of Guilford County. The special purpose of the tax is to erect buildings and maintain schools within the taxing district and these things are to be accomplished through the agency of the county board of education. *Faison v. Comrs.*, 171 N. C., 411.

4. The proviso in the first section of the original act is in this language: *Provided*, that if the General Assembly or the board of commissioners by authority of the General Assembly shall order a general increase in the valuation of property in said territory, then it shall operate to automatically decrease by the same percentage the maximum rates fixed in this section and vice versa.

The plaintiff contends that this proviso is void for uncertainty and that the entire act for this reason is ineffective. We do not concur in this conclusion. *Comrs. v. Boring, supra.* Moreover, it is altogether possible that no contingency will arise requiring judicial construction of the proviso and it is unnecessary at this time to discuss a question which is purely academic.

Finding no error we affirm the judgment.

Affirmed.

W. C. REDDING ET UX. v. CHARLES F. DUNN.
CHARLES F. DUNN v. WILL LYNCH AND LULA LYNCH.

(Filed 18 April, 1923.)

Appeal and Error—Rules of Court—Dismissal—Motions—Reinstatement.

A motion to reinstate a case on appeal that has been dismissed on appellee's motion, for nonconformity with the rules of Court requiring the record to be indexed, and to show the appellant's exceptions under proper assignments of error, etc., in accordance with the manner specified, will be denied, when the granting of the motion would not cure the fatal defects upon which the appellee's motion had been granted.

MOTIONS to reinstate appeals heretofore dismissed at the present term.

Chas. F. Dunn, in propria persona, for movant.
No counsel contra.

STACY, J. The appeals in these cases were dismissed at the present term for noncompliance with the rules governing appeals to this Court, as was also the appeal in *Bunn and Anderson v. Dunn, ante,* 108. The appellant concedes his failure to comply with the rules, but now states that he has three or four thousand dollars invested in other tax certificates, similar to those under consideration here, and that a decision on the merits in these cases would be quite beneficial to him in determining the validity of his remaining tax certificates and tax deeds. He also alleged that the irregularities, which brought about a dismissal of his appeals, were not due entirely to his neglect and that they were not discovered by him in time to have the same corrected before the cases were called for argument in this Court. He therefore files a motion in each case to reinstate the appeal. The objections urged by the appellees, when the cases were before us, would not be cured by a reinstatement of the appeals and hence the motions must be denied.

Movant further says in explanation of his failure to group his assignments of error and to discuss the exceptions in his brief, as pointed out in the opinion dismissing the appeals, that he was advertent to this rule, but was under the impression that such was not necessary where only one question was involved on the appeal. In regard to this, he says: "I cannot just here name the volume I saw this in, but it is somewhere in the volumes which I have read from 140 to 183 inclusive." Appellant doubtless has in mind the cases of *Bessemer Co. v. Hardware Co.,* 171 N. C., 728; *Greensboro v. McAdoo,* 112 N. C., 359; *Wallace v. Salisbury,* 147 N. C., 58, and others to like effect, holding that no assignment of error is necessary where there is but a single exception and this is presented by the record, nor where the case is heard below on an agreed

statement of facts, nor when the exception to the judgment is the only one taken and the appeal itself is an exception thereto. C. S., 643, and cases cited thereunder. And if this were the only irregularity appearing on the record, appellees' motions to dismiss would have been denied in the first instance. But the fatal defect was in bundling all three cases together and printing them, with the briefs included, in one pamphlet, or record, and this without any proper index or guide to assist us in locating the exceptions, orders, judgments, etc. Moreover, we observe, from the briefs filed, that the "one question" mentioned by appellant is not directed or confined to the validity of the judgment or order in each case.

The rules of practice, as revised and adopted at the Fall Term, 1917, will be found in the 174th volume of our Reports, beginning on page 827. Rule No. 34, as subsequently amended, will be found in 182 N. C., 922.

Motions denied.

MINNIE SHORE AND HUSBAND, CHARLES SHORE, v. LULA HOLT.

(Filed 18 April, 1923.)

1. **Actions—Misjoinder—Parties—Causes of Action—Husband and Wife—Demurrer—Dismissal—Retention Upon Terms—Courts—Statutes.**

   An action brought by the wife in which her husband has joined, each independently seeking to recover from the defendant the value of their services separately rendered, upon a *quantum meruit*, is a misjoinder both of parties plaintiff and causes of action, which will ordinarily be dismissed upon demurrer; but the court may sustain the demurrer and permit the defect to be cured by an amendment and the wife's cause proceeded with upon such terms as it considers just. C. S., 516.

2. **Same — Pleadings — Amendments — Appeal and Error — Remanding Cause—Procedure.**

   While the husband is not a necessary party to his wife's action to recover for the value of her services rendered upon a *quantum meruit*, C. S., 2513, his joinder therein as a party plaintiff is not improper; and where he has alleged an independent cause of action upon a *quantum meruit*, the Supreme Court, on appeal, in the exercise of its discretion, may remand the cause with direction that the allegations of the complaint as to the statement of the husband's cause be stricken out and the action of the wife proceeded with.

APPEAL by defendant from *Harding, J.*, at November Term, 1922, of GUILFORD.

Civil action to recover upon a *quantum meruit* for services rendered and for an accounting.

The defendant demurred upon the ground that there was a misjoinder, both of parties and of causes of action. Demurrer overruled. Defendant excepted and appealed.

No counsel appearing for plaintiffs.
John A. Barringer for defendant.

STACY, J. The feme plaintiff alleges that in 1908 she was a ward of the Children's Home Society of North Carolina, Inc.,—being only ten years old at that time—and that she was induced to go and live in the home of the defendant with the assurance that she, the feme plaintiff, would be adopted as a child of the defendant and thereby become entitled to receive, at the death of the defendant, a child's share of her estate. The plaintiff, relying upon this promise, changed her name, went into the home of the defendant and rendered every kind of service required of her by the defendant. She alleges that she cooked, washed dishes, milked the cow, nursed the defendant's husband in his sickness, attended to many of the chores about the house, worked in the cotton mill and in the cigar factory and turned over her wages to the defendant.

On 1 August, 1915, the feme plaintiff was married to Charles Shore, who also worked for the defendant for a period of eight months immediately thereafter. Plaintiff later learned that she had not been legally adopted by the defendant, and it is alleged that the defendant has now disavowed her intention to carry out her promise.

The feme plaintiff brings this action to recover upon a *quantum meruit* for the value of the services rendered by her to the defendant under the promise of reward as above set out. For the right to maintain her action, she relies upon the line of cases of which the following are representative: *Hayman v. Davis,* 182 N. C., 563; *McCurry v. Purgason,* 170 N. C., 463; *Debruhl v. Trust Co.,* 172 N. C., 839; *Patterson v. Franklin,* 168 N. C., 75; *Winkler v. Killian,* 141 N. C., 575; *Whetstine v. Wilson,* 104 N. C., 385; *Miller v. Lash,* 85 N. C., 51.

Charles Shore is joined as a coplaintiff with his wife; and, in the present suit, coupled with his wife's complaint, he has set up a separate and independent cause of action for services rendered by him and for an accounting for the eight months he was with the defendant.

The basis of the demurrer is that there is a misjoinder, both of parties and of causes of action. Where this occurs, it has been held with us that the demurrer should be sustained and the action dismissed. *Roberts v. Mfg. Co.,* 181 N. C., 204; *Thigpen v. Cotton Mills,* 151 N. C., 97. Clearly, the two causes of action are separate and distinct; and, if the feme plaintiff's husband has been improperly joined as a party plaintiff in her suit, the demurrer should be sustained and the action dismissed

under authority of the cases just cited. But if the joinder of the husband, as a formal party, in the wife's suit, is a matter of no special moment, as was said in *Patterson v. Franklin,* 168 N. C., 77, it would seem that she should be allowed to proceed on her cause of action with the allegations of her husband stricken from the complaint.

When several causes of action have been improperly united, the Court may sustain the demurrer and permit the defect to be cured by amendment, or order a division, upon such terms as are just, under authority of C. S., 516. *Gattis v. Kilgo,* 125 N. C., 133.

True, in *Lipinsky v. Revell,* 167 N. C., 508, it was said that the husband was not a necessary or even a proper party to an action of this kind, but this was unnecessary to the decision in that case and hence the statement that he was an improper party must be considered as no more than an *obiter dictum.* That he is not a necessary party is established by all the decisions on the subject (C. S., 2513), but in *Sandlin v. City of Wilmington, ante,* 257, it was suggested, on the peculiar facts there presented, that the husband might not be an improper party in an action brought by his wife to abate a nuisance. See, also, *Craddock v. Brinkley,* 177 N. C., 127; *Kirkpatrick v. Crutchfield,* 178 N. C., 352, and *Price v. Electric Co.,* 160 N. C., 450.

While the demurrer should have been sustained for a misjoinder of the two causes of action, we are of opinion that the feme plaintiff's suit should not be dismissed.

In the present condition of the pleadings, we will remand the cause for further action along the lines suggested in this opinion; such procedure being permitted in the exercise of our discretion. *Huggins v. Waters,* 154 N. C., 444.

Let one-half the costs of this appeal be taxed against the plaintiffs and one-half against the defendant.

Remanded.

PLANTERS BANK AND TRUST COMPANY v. ANNIE PIPKIN YELVERTON.

(Filed 18 April, 1923.)

1. Appeal and Error—Issues—Courts.

The submission by the court to the jury of a greater number of issues than those tendered by the appellant, to enable the parties to have the full benefit of their contentions to the jury, cannot be held for reversible error.

2. Bills and Notes—Negotiable Instruments—Fraud—Promises—Representations.

While the failure to perform a promise in the future cannot, as a general rule, be the basis of setting aside a transaction for fraud, it is otherwise if the fraud be predicated upon the nonperformance of a promise and the promise is shown to have been a device to accomplish the fraud; and where the defendant has been induced to give her promissory note for shares of stock in a corporation being organized, upon the false assurance that the stock was to be pooled and afterwards sold to subscribers, and that she would not have to pay anything upon the note, it may be shown as evidence of fraud to invalidate the note, in the hands of a holder with notice of and bound by the defendant's equities, that the promise was made only as a design to procure the note, and without the promissor's intention to fulfill it.

3. Bills and Notes — Negotiable Instruments — Fraud—Cancellation—Damages.

One who has given her note induced by the fraudulent promise of another, upon which she has relied, and sufficient to invalidate the instrument, has the right to the cancellation of the instrument and avoid liability thereon.

4. Bills and Notes—Negotiable Instruments—Endorsement—Equities—Statutes.

Where the maker executes her promissory note to her own order and delivers it without endorsement, any person thereafter acquiring the instrument without endorsement takes it subject to the equities existing between the original parties, C. S., 3004, 3030; the Statute requiring that where the instrument is "payable to order" it is negotiated by the endorsement. C. S., 3010.

5. Bills and Notes—Negotiable Instruments—Endorsees—Fraud—Pleadings—Burden of Proof.

The burden of proof is on the plaintiff suing upon a negotiable note as endorsee to establish the endorsement by a preponderance of the evidence, when the defendant denies the endorsement and pleads fraud.

6. Appeal and Error—Instructions—Evidence—Immaterial Variations.

An immaterial variance between the judge's statement of appellant's evidence in his charge and that given upon the stand will not be held for reversible error.

7. Bills and Notes—Negotiable Instruments—Equities—Fraud—Evidence—Verdict.

Where it is established by the verdict of the jury that the plaintiff acquired the negotiable instrument sued on without endorsement and with knowledge of the equities existing between the original parties that would invalidate it for fraud, the admission of evidence relating to the alteration of the note after its delivery becomes immaterial.

8. Instructions—Statutes—Appeal and Error.

Where the trial judge has instructed the jury correctly but generally on the essential features of the cases, the charge will not be held for error upon appellant's exception that he had not explained to the jury the legal principles in conformity with the provisions of C. S., 564, when he has not submitted in apt time correct special prayers for instruction to such effect.

BANK *v.* YELVERTON.

APPEAL by plaintiff from *Allen, J.*, at the October Term, 1922, of WAYNE.

The plaintiff alleged that the defendant executed and thereafter endorsed and transferred to it, before maturity, her promissory note in words and figures as follows:

"$5,000. May 26, 1920.

Nov. 15, 1920, after date, I, we, or either of us, promise to pay to the order of myself the sum of Five Thousand Dollars, for value received, payable at Planters Bank & Trust Company, Fremont, N. C., with interest from date at the rate of 6 per cent per annum until paid. The makers and endorsers of this note hereby waive demand of payment, protest and notice of protest, and hereby consent that time of payment may be extended without notice thereof.

ANNIE PIPKIN YELVERTON."

The defendant denied both the execution and the endorsement of the note, and alleged that the Cushing Petroleum Company by means of false and fraudulent representations had induced her to agree to execute her note upon the express agreement that its delivery should be conditioned upon the company's holding it until after the first of October and until the "pool stock" should be offered for sale to discharge the note; that the note had been materially altered since last seen by the defendant; that the sale of the stock was unlawful because the Petroleum Company was subject to and had not complied with C. S., 6363-6475 inclusive; that there was no contract in writing between the company and the defendant; that the company received a commission greatly in excess of the commission allowed by law; and that the note, if executed, was illegal, null and void. The issues were answered as follows:

"1. Was the note introduced in evidence by the plaintiff signed by the defendant, Annie Pipkin Yelverton, as maker? Answer: 'Yes.'

"1½. Did she endorse said note on the back? Answer: 'No.'

"2. If so, was the signature as maker of said note obtained by the agents of the Cushing Petroleum Company by misrepresentation and fraud? Answer: 'Yes.'

"3. If so, is the plaintiff bank the innocent holder of said note in due course and without notice of infirmities? Answer: 'No.'

"4. Was the note, after delivery to the said agents, altered by the insertion without the authority of the defendant of the words: 'Planters Bank & Trust Company, Fremont, N. C.?' Answer: 'Yes.'

"5. If so, did the plaintiff have notice of it? Answer: 'No.'"

Judgment for the defendant. Appeal by the plaintiff.

Langston, Allen & Taylor for the plaintiff.
Dickinson & Freeman for the defendant.

ADAMS, J. The first fifteen exceptions relate to the admission or rejection of evidence and require no special discussion. The evidence excepted to was competent as tending to show such knowledge by the plaintiff of the defendant's equities as amounted to bad faith in taking the note, or fraud in procuring its execution, or some incidental circumstance in corroboration of other testimony; and the excluded evidence which is the subject of exceptions 10, 11, and 11½ was not in any view competent against the defendant.

Equally untenable are the defendant's several exceptions to the issues which were submitted to the jury. The plaintiff tendered three, but the court submitted six with the manifest purpose of enabling the parties to have the full benefit of all their contentions before the jury. On what ground the plaintiff can legitimately complain of this is not perceived. *Patterson v. Mills,* 121 N. C., 258; *Pretzfelder v. Ins. Co.,* 123 N. C., 164; *Straus v. Wilmington,* 129 N. C., 99; *Holler v. Tel. Co.,* 149 N. C., 337; *Brewer v. Ring,* 177 N. C., 476.

Exceptions 24 to 29½ are addressed to the court's refusal to give certain prayers for instructions. The plaintiff claims to have been entitled to these instructions principally on the ground that there is no sufficient evidence of fraud, and for this reason it becomes necessary to examine the defendant's allegations as well as the evidence tending to support them. The defendant alleges: "That on or about 26 May, 1920, agents of the Cushing Petroleum Company approached the defendant and represented to her that the said company was offering for sale a limited amount of its capital stock known and designated by said company as 'pool stock'; that this pool stock was to be released for transfer or sale on 1 October, 1920, and that immediately after the release of said pool stock or contemporaneously with said release, the capital stock of the company would be offered for sale on the open markets; that if the defendant would execute a note to said company, certain shares of said pool stock would be issued by the company in her name and attached to said note which was to be held by said company and not to be transferred or sold; that upon the release of said pool stock a sufficient number of shares of the pool stock issued in the name of the defendant would be sold to pay off and discharge the said note of the defendant and the balance of the unsold stock would then be issued and delivered to the defendant; that the said agent further represented to the defendant that the property and other assets of the company so far exceeded its liabilities that when said stock was offered for sale its market value would be nearly three times its par value; that all of said representations were false and untrue, and were made with the intent and purpose of defrauding the defendant in the sale of said stock to her, as the defendant is informed and believes, and therefore alleges."

She further alleges that by these representations she was deceived

and induced to agree to execute her note with the express understanding that it should be held by the Petroleum Company until after the first day of October and until the "pool stock" should be offered for sale; that when the capital stock was sold the note and the "pool stock" which was not sold to discharge the note should be returned, and that the company failed and refused to abide by and perform its agreement.

There was evidence tending to show that the agents of the Petroleum Company when soliciting the execution of the note told the defendant she would never be called on for any money; that they wanted her to lend them her credit by executing the note which they agreed to return to her prior to the first day of October with certificates of stock attached; that they said they had made arrangements to take care of her note; that she "would not have to pay a penny"; that she never endorsed the note; and that it was altered by the insertion of "The Planters Bank & Trust Company" after she had signed it.

As a general rule fraud cannot be predicated upon promissory representations (*Pritchard v. Dailey*, 168 N. C., 330) because a promise to perform an act in the future is not in the legal sense a representation, but it may be predicated upon the nonperformance of a promise when the promise is a device to accomplish the fraud. 12 R. C. L., 254 *et seq.* The question involves the promissor's state of mind as a fact (for such condition of mind is a fact) and a misrepresentation of the state of one's mind is therefore a misstatement of an existing fact. 26 C. J., 1093; 8 W. L. R., 570. The principle is thus stated in *Hill v. Gettys*, 135 N. C., 373: "The general rule in regard to promises is that they are without the domain of the law, unless they create a contract, breach of which gives to the injured party simply a right of action for damages, and not a right to treat the other party as guilty of a fraud. But that proceeds upon the ground that to fail to perform a promise is no indication that there was fraud in the transaction. There may, however, have been fraud in it; and this fraud may have consisted in making a promise with intent not to perform it. To profess an intent to do or not to do, when the party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made. A promise is a solemn affirmation of intention as a present fact." 1 Bigelow on Fraud, 484. (The author is discussing, of course, civil remedies.)

"When a promise is made with no intention of performing it, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense." *Goodwin v. Horne*, 60 N. H., 485.

"The intent is always a question for the jury, and to determine whether the intent was fraudulent the jury have necessarily to look to the circumstances connected with the transaction or those immediately

preceding or following it." *Des Farges v. Pugh,* 93 N. C., 31; 53 Am. Rep., 446.

And in *Whitehurst v. Ins. Co.,* 149 N. C., 273, it is said: "It is not always required, for the establishment of actionable fraud, that a false representation should be knowingly made. It is well recognized with us that, under certain conditions and circumstances, if a party to a bargain avers the existence of a material fact recklessly, or affirms its existence positively, when he is consciously ignorant whether it be true or false, he may be held responsible for a falsehood; and this doctrine is especially applicable when the parties to a bargain are not upon equal terms with reference to the representation, the one, for instance, being under a duty to investigate, and in a position to know the truth, and the other relying and having reasonable ground to rely upon the statements as importing verity. *Modlin v. R. R.,* 145 N. C., 218; *Ramsey v. Wallace,* 100 N. C., 75; *Cooper v. Schlesinger,* 111 U. S., 148; Pollock on Torts, 7 Ed., 276; Smith on Fraud, 277, sec. 3; Kerr on Fraud and Mistake, 68."

These principles, we think, are applicable to the evidence; and besides, a careful reading of the record will show that not all the representations testified to in behalf of the defendant relate to the future. On the contrary there is the positive statement that the agents said they had made arrangements to take care of the defendant's note, and in connection with other evidence this may reasonably be construed as signifying their intention to return the note on or before the expiration of the time agreed on by the parties. In any event we cannot hold that there was no sufficient evidence for the jury to consider. *Troxler v. Building Co.,* 137 N. C., 51; *Leonard v. Power Company,* 155 N. C., 10; *Massey v. Alston,* 173 N. C., 215.

The plaintiff further insists that even if the agents of the Petroleum Company fraudulently induced the execution of the note the defendant suffered no loss and invokes the familiar doctrine that the injured party must show both reliance upon the fraudulent representation and damage resulting therefrom. But the defendant's present loss is her liability on the note, and if after establishing the fraud she is denied the right to cancel the alleged obligation and is required to pay it the inevitable result of the fraud will be the defendant's payment of $5,000 with interest in consideration of a "blue sky" promise.

The note was made payable to the order of the defendant, who is the maker, and the verdict shows that she did not endorse it; but the plaintiff says that by virtue of C. S., 3004 and 3030, it has a right to the defendant's endorsement. The latter section provides that where the holder of an instrument payable to his order transfers it for value without endorsing it, the transfer vests in the transferee such title as the transferrer had therein, and the transferee acquires in addition the

right to have the endorsement of the transferrer, but for the purpose of determining whether the transferee is a holder in due course, the negotiation takes effect as of the time when the endorsement is actually made. And sec. 3010 provides that an instrument "payable to order" is negotiated by the endorsement of the holder and is completed by delivery.

In several decisions this Court has held that a transferee without endorsement acquires, not the legal, but only the equitable title to the instrument, and that without such endorsement the holder's title is subject to the equities and defenses existent between the original or prior parties. *Steinhilper v. Basnight,* 153 N. C., 293; *Myers v. Petty, ibid.,* 462; *Critcher v. Ballard,* 180 N. C., 111. Elsewhere there is authority for holding that if the transferrer has the legal title it must pass by the transfer, subject nevertheless to existing equities. Brannan's Neg. Ins. Law, p. 155, sec. 49. So, in any event, the note not having been endorsed, the holder's title is subject to the equities on which the defendant relies.

We find no error in his Honor's instructions concerning the issue marked 1½. The defendant having denied the endorsement, and having pleaded fraud, the burden rested upon the plaintiff to establish the endorsement by a preponderance of the evidence. *Myers v. Petty, supra; Bank v. McEachern,* 163 N. C., 333.

Exceptions 33, 33½, 40, 47, 48, 49, which relate to his Honor's instructions on the second issue, have been disposed of substantially by what has been said. While the defendant did not testify in the express language used by his Honor we do not regard the variance such as entitles the plaintiff to a new trial. The expression complained of is closely connected with the other portions of the charge which fairly represent the defendant's evidence, and we fail to see any sufficient reason for holding that the jurors were probably misled.

As we understand the verdict exceptions 34-39, which are addressed to evidence relating to the alleged alteration of the note after its delivery, are immaterial in view of the jury's response to the issues numbered 1½ and 2, because if the note was not endorsed and if its execution was procured by fraud, the defendant is not liable to the plaintiff although the alleged alterations may not have been made.

Exceptions 41-46 were entered on the ground that the court did not explain to the jury the legal principles and present the contentions involved in the case as required by sec. 564 of the Consolidated Statutes. His Honor instructed the jury generally on the essential features of the case and if under these circumstances the plaintiff desired that any particular phase of the testimony or contentions be presented or more fully explained it should have submitted special prayers for instructions to such effect. *S. v. Merrick,* 171 N. C., 795; *S. v. Thomas,* 184 N. C.,

759; *Jarrett v. Trunk Co.*, 144 N. C., 301; *Butler v. Mfg. Co.*, 182 N. C., 552.

Upon due consideration of the record and the briefs we find no sufficient reason for disturbing the judgment of the lower court.

No error.

WILLIAM B. SNOW, INDIVIDUALLY AND AS ADMINISTRATOR OF ELIZABETH McC. SNOW v. ADELAIDE S. BOYLSTON, INDIVIDUALLY AND AS ADMINISTRATRIX OF E. McC. SNOW AND MARY S. BASKERVILLE.

(Filed 18 April, 1923.)

1. Wills—Interpretation—Intent.

The intent of the testator as expressed in the will, when not in violation of law, shall be given effect, and in ascertaining it, the instrument will be considered as a whole, giving to each and every part significance, and harmonizing apparent inconsistencies when it can be done by a reasonable interpretation.

2. Same—Equal Distribution—Use of Home Place.

The will of the testatrix estimated the value of her estate at $100,000 after deducting the payment of certain obligations, and after further allowing for certain pecuniary legacies, directed that her estate be divided between her three children, naming them, with further provision that her home place, valued at $40,000 in her estimate of the entire estate, shall be a home for a certain one of her daughters "till such time as a smaller place can be provided and the home place sold for a division": *Held*, the intent of the testator, as gathered from the language used, was an equal division of her estate, including the proceeds from the sale of the home place, among her children named by her; and an interpretation that the "smaller place" should be provided for the daughter from the estate before division made, would not only violate the pervading purpose of the will, but would require the addition of words not appearing therein, and such would not be a proper charge against the estate.

3. Executors and Administrators—Account and Settlement—Statutes—Rights of Distributees.

While our Statute, C. S., 150 allows executors and administrators two years within which to settle the decedent's estate, with an extension of time for good cause shown, this does not necessarily give them the two years in which to make settlement when the status of the estate would otherwise permit, and if the estate is so far advanced as to justify it, the executors and administrators may be called on by the beneficiaries to account and pay over within the two years period. C. S., 156.

4. Same—Use of Home Place—Reasonable Time.

When it appears from the proper interpretation of a will that the estate of the testatrix, after the payment of small pecuniary legacies, etc.,

should be equally divided among her three children, and that one of them should have the use of the home place till she could provide a "smaller place" from her share of the estate, and it is properly made to appear that ample funds are in the hands of the executor to pay certain small debts and charges against the estate, remaining unpaid, and that the estate is ready for distribution: *Held*, the right of the daughter to occupy the home place free of rent was only for a reasonable time after the death of the testatrix, having regard to the circumstances presented, the condition of the estate and the time required for its proper settlement, thus affording the daughter a home until from her share she would be in a position to procure a smaller home for herself; and where she has remained in the home place for a longer time than the circumstances would permit, she is properly chargeable with a reasonable rent thereafter.

APPEAL by defendant from *Lyon, J.*, at October Term, 1922, of WAKE.

There were two proceedings, one for the partition of the real estate of Elizabeth McC. Snow, deceased, by the heirs at law, and the other for the settlement and distribution of the personal estate of said Elizabeth McC. Snow, consolidated and tried by consent before his Honor C. C. Lyon.

There was judgment directing partition of the realty and also construing a paper-writing which was agreed upon by all parties should be considered as the last will and testament of Mrs. Snow and making distribution of the personal estate accordingly.

From the judgment entered defendant, Mrs. Adelaide Boylston, appealed to Supreme Court.

James H. Pou and Murray Allen for plaintiff.
Manning & Manning for defendant.

HOKE, J. The pertinent facts and conclusions of law thereon are embodied in the judgment as follows:

The two above entitled causes coming on to be tried at the second October, 1922, Term of the Superior Court of Wake County, before his Honor, C. C. Lyon, judge presiding, the same having been by consent of the parties thereto, consolidated and tried together; and a jury trial having been waived by counsel for the parties and the signing of the judgment having been, by consent of counsel, continued to the second November Term, 1922, of said court; and the said parties to said causes having, in open court, agreed and consented that the paper-writing on 7 August, 1920, by Mrs. Elizabeth McC. Snow and found among her valuable papers and effects, copy of which is as follows, viz.:

"August 7, 1920. To my children: I am writing this to beg each one of you to try and carry out what you will know to be my wishes in case

I shall be called suddenly before a formal will can be made. After all notes are paid there will remain $100,000 (one hundred thousand) to be divided among the three children, Mary S. Baskerville, William B. Snow and Adelaide S. Boylston. The following legacies are to be deducted from total before the division into three is made $1,000 (one thousand dollars) to each of my grandchildren, Charles Baskerville, Jr., Elizabeth McC. Baskerville, Adelaide S. Boylston, Jr., William B. Snow, Jr., and Jno. Kendall Snow; $100.00 (one hundred) to Delia Hartsfield; $25.00 (twenty-five dollars) to Berline Flagg.

"The Boylan Avenue home place I now hold at $40,000—if not sold before this comes into your hands, it is to be a home for Adelaide and her daughter till such time as a smaller place can be provided and the old home place sold for division.

"To Charles Baskerville, Jr., an old family ladle and spoons; to Elizabeth B., the silver sugar bowl and cream pitcher made from my baby cup given me by my grand-father Boylan; to Adelaide S. Boylston, Jr., portrait of her great-great aunt, Annie Lawrence.

"To William B. Snow, Jr., the old silver can of his great-great grandfather, William Boylan; to John K. Snow, my gold double-case watch"; should be considered and become the last will and testament of the said Elizabeth McC. Snow, deceased, and declared binding in every particular upon the parties to said action, to wit: William B. Snow, Adelaide S. Boylston and Mary S. Baskerville, the son and daughters respectively of the said Mrs. Elizabeth McC. Snow, and that the estate of the said testatrix should be settled and divided according to the provisions thereof, although the said paper-writing was not signed by said testatrix, and the said parties having thereupon further agreed and consented that a jury trial be waived, and that the said paper-writing should be construed by his Honor, C. C. Lyon, judge presiding, and the contentions of the parties having been fully stated and argued by counsel, and the court having fully heard and considered same:

It is thereupon ordered, adjudged, and decreed by the court that the said paper-writing hereinbefore set out be and the same is hereby declared effective as the last will and testament of Elizabeth McC. Snow, deceased, and binding upon the parties thereto, and that said estate shall be divided and distributed according to its terms and provisions, and that the true intent and meaning of the same is that after the payment of the pecuniary legacies of one thousand dollars to each of the grandchildren of said Mrs. Elizabeth McC. Snow, to wit: Charles Baskerville, Jr., Elizabeth McC. Baskerville, Adelaide S. Boylston, Jr., William B. Snow, Jr., and John Kendall Snow, and the payment of one hundred dollars to Delia Hartsfield, and twenty-five dollars to Berline Flagg, the residue of said estate, both realty and personal

property, after the payment of all debts of the estate and cost of administration, is to be equally divided among the three children of the said Mrs. Elizabeth McC. Snow, to wit: Mary S. Baskerville, William B. Snow and Adelaide S. Boylston, one-third part each, and that the Boylan Avenue home place was to be occupied as a home by the said Adelaide S. Boylston and her daughter until such time as the debts due the estate could be collected and the notes and other indebtedness of the estate could be paid and the said Adelaide S. Boylston thereby enabled to provide for herself a smaller place from and out of her one-third part of the real estate and personal property, and that at such time, the Boylan Avenue home place was to be sold for an equal division among the said three children, in the proportion of one-third each; and it being admitted by the administrators of the said estate, parties thereto, that all notes and debts of the said estate have been long since paid, and more than twelve months, to wit: Fifteen months having elapsed since the qualification of the said administrators and since the publication of notice to creditors, and there being no reason for the further administration of said estate, and the devisees and legatees under the said last will and testament being entitled by law to have a division of the real estate and a payment of legacies and distribution of the personal property of said estate in accordance with the provisions of said last will and testament, as hereinbefore declared and defined, it is further ordered, adjudged, and decreed that the said William B. Snow and Adelaide S. Boylston, administrators of the estate of Mrs. Elizabeth McC. Snow, proceed at once to convert into money a sufficiency of the stocks belonging to the personal estate of the said Mrs. Elizabeth McC. Snow to pay the said pecuniary legacies in full to the legatees of age, and those not of age to their guardians, and deliver the specific bequeaths of personal property mentioned in the said will, and divide and distribute and deliver to Mary S. Baskerville, William B. Snow, and Adelaide S. Boylston a one-third part each of the residue of the personal property of said estate, mentioned and described in the petition and complaint herein, the same to be appraised and valued by a competent appraiser or appraisers and divided according to value, and file with the clerk of the Superior Court of Wake County a final account of the said administration.

And it is further ordered, adjudged and decreed that the petitioners and plaintiff, William B. Snow, is the owner and entitled to the possession of an undivided one-third interest and estate in fee simple in the real estate mentioned and described in the petition and complaint herein, and that the defendant, Adelaide S. Boylston, is the owner and entitled to the possession of an undivided one-third interest and estate in fee simple in the real estate mentioned and described in the complaint

herein, and that the defendant, Mary S. Baskerville, is the owner and entitled to the possession of an undivided one-third interest and estate in fee simple in the real estate mentioned and described in the petition and complaint herein, and that all of the said real estate except the Boylan Avenue home place shall be divided equally between the said William B. Snow, Mary S. Baskerville and Adelaide S. Boylston; and that Gavin Dortch and D. F. Fort, Jr., and Daniel Allen are hereby appointed commissioners of this court to make a division of the real estate among the three several devisees and heirs at law above mentioned, the said division to be made into equal shares in point of value as near as possible, and to charge the more valuable dividends with such sums of money as they may think necessary to be paid to the dividends of inferior value, in order to make equality of partition, except that the Boylan Avenue home place consisting of the following real estate, to wit:

Three (3) lots situated at the southwest corner of the intersection of Morgan Street and Boylan Avenue, and facing upon Boylan Avenue, upon which is situated the dwelling house and residence of the said Elizabeth McC. Snow, and which said three lots have a frontage of 182.4 feet on Boylan Avenue, bounded on the north by Morgan Street, and on the south by the land of Lynn Wilder.

Three (3) vacant lots adjoining the above mentioned three lots on the west, and fronting upon Morgan Street, as shown upon a map or plat of same surveyed and platted by John B. Bray in March, 1917, filed with the petition and complaint herein, marked Exhibit "A," shall be forthwith sold by the administrators of said estate as provided in the said last will and testament, and to that end the said administrators are hereby directed to have the dwelling house now situated upon said home place, the same being the old Snow residence, removed from its present location to Lot No. 6, on said map or plat by some experienced and competent house-mover, and shall pay the cost and expense of removing, replacing and restoring same out of the assets of said estate, and thereupon shall offer for sale at public auction on the premises to the highest bidder, for cash, remaining vacant lots and said Lot No. 6 with the house thereon, after having duly advertised said sale for 30 days in some daily newspaper published in the city of Raleigh, and convey the lots so sold to the purchasers thereof by good and sufficient deeds, and shall divide the net proceeds of said sale after payment of costs and expenses of the same, and of the removal of the house aforesaid, among the said Mary S. Baskerville, William B. Snow, and Adelaide S. Boylston, one-third each; that in the advertisement and sale of the home place the map or plat of same made by John B. Bray, and hereinbefore mentioned and attached to the petition and complaint herein, shall be used and followed with such change as to alleyways as

may be deemed wise and advantageous, and Lot No. 4 shall be included in the areas of lots Nos. 1, 2, and 3 so as to give sufficient depth to those three lots to make it possible to conform any buildings to be hereafter erected thereon to the house lines of adjoining residence, and make said lots of greater value residential property; and it appearing to the court that all debts due the estate of Mrs. Elizabeth McC. Snow has been collected, and all notes and other indebtedness of the said estate has been paid or provided for by ample cash in the hands of the said administrators on 1 August, 1922, and that at that time the said Adelaide S. Boylston could have provided for herself a smaller dwelling-house than the Snow home place from and out of her one-third part of the real estate and personal property, either by occupying one of the four dwelling houses belonging to said estate situated on West Morgan Street, adjoining the Snow home place, or by purchasing or building such smaller dwelling house out of and by means of her one-third share of said estate; it is further ordered and adjudged, that Adelaide S. Boylston shall pay to the estate of Mrs. Elizabeth McC. Snow the reasonable monthly rental value of said Snow home place for each and every month of her occupancy thereof from and after 1 January, 1923, and it is further ordered that the cost of this action be paid by the administrators out of the estate.

For the purpose of carrying out the foregoing provisions of this judgment as to the sale of the real estate, William B. Snow and Adelaide S. Boylston, administrators of the estate of Mrs. Elizabeth McC. Snow, are appointed commissioners with all necessary powers to carry out said provisions and execute all deeds and other papers necessary thereto.

C. C. LYON,
Judge Presiding.

It is chiefly urged for error that the court below failed to rule that the "smaller place" to be provided for Mrs. Adelaide S. Boylston, the appellant, should be paid for out of the estate before settlement and distribution among the legatees and heirs at law of Mrs. Snow the testatrix, but in our opinion the objection cannot be sustained. It is the accepted position in the construction of wills that unless in violation of law the intent of the testator as expressed in the will shall be given effect and in ascertaining this intent the will shall be considered as a whole, giving to each and every part significance and harmonizing apparent inconsistencies where this can be done by a reasonable interpretation. *Pilley v. Sullivan,* 182 N. C., 493; *Goode v. Hearne,* 180 N. C., 475; *Hinson v. Hinson,* 176 N. C., 613; *Freeman v. Freeman,* 141 N. C., 97. And the decisions on the subject further hold that in case of conflict the manifest and leading purpose of the testator shall be allowed to prevail. *Tucker v. Moye,* 115 N. C., 72; *Holman v. Price,* 84 N. C.,

86; *Macon v. Macon,* 75 N. C., 377; *Lassiter v. Wood,* 63 N. C., 360. In the *Tucker case, supra, Chief Justice Smith* delivering the opinion said: "A leading principle in the interpretation of wills is to recognize the general pervading purpose of the testator, and to subordinate thereto any inconsistent special provisions found in it." And in *Lassiter v. Wood* construing the will there presented, it was said: "It is apparent that the leading purpose of the testator was to make all his children equal. The purpose of the testator as gathered from the will, is always to be carried out by the Court, and minor considerations when they come in the way must yield. Especially is this true, when the purpose is in consonance with justice and natural affection."

In the will before us, as established by the findings of the court, the clauses more directly pertinent to the question presented in the exceptions, are as follows:

"After all notes are paid there will remain $100,000 (one hundred thousand) to be divided among the three children, Mary S. Baskerville, William B. Snow and Adelaide S. Boylston. The following legacies are to be deducted from total before the division into three is made $1,000 (one thousand dollars) to each of my grandchildren, Charles Baskerville, Jr., Elizabeth McC. Baskerville, Adelaide S. Boylston, Jr., William B. Snow, Jr., and John Kendall Snow; $100 (one hundred) to Delia Hartsfield; $25.00 (twenty-five dollars) to Berline Flagg. The Boylan Avenue home place I now hold at $40,000— if not sold before this comes into your hands, it is to be a home for Adelaide and her daughter till such time as a smaller place can be provided and the old home place sold for division." Then follows certain minor specific legacies to the grandchildren of the testatrix in no way affecting the interpretation. Considering these provisions as a whole, it is clear that after payment of the pecuniary legacies, the manifest intent of the testatrix is that there should be an equal division of the property among her three children, and to hold that the estate should be first charged with the cost of a home for appellant would not only be in violation of the pervading purpose of the will, but would also require the addition of words that do not now appear therein. Under the authorities cited therefore, and the principle they approve, and illustrate, his Honor has correctly ruled that the cost of the home for appellant is not a proper charge against the estate. It is further contended for appellant that his Honor erred in holding that she is to be charged with the rents of the old home place from 1 January, 1923. The position being, as we understand it, that by correct construction of the will, appellant is entitled to occupy the old home place free of rent until another is provided and in any event for not less than two years from the time of the qualification of the administrators in July, 1921. We are of opinion, however, that in the clause applicable it was the purpose

and intent of the testatrix that her daughter should have a right to occupy the old home free of rent for a reasonable time after the death of said testatrix, having regard to the circumstances presented, the condition of the estate and the time required for its proper settlement, thus affording the daughter a home until from her share of the estate she should be in a position to procure a smaller home for herself. It is not the intent or meaning of our statutes on the subject, C. S., 150, that executors or administrators are allowed absolutely two years in which to settle an estate, the provision is that unless for good reason further time is allowed, these officers shall account and settle immediately after the expiration of two years, and both by the decisions and express statutory provisions on the subject if the estate is so far advanced as to justify it administrators and executors may be called on to account and pay over within the two years period. *Cariness v. Fidelity Co.*, 140 N. C., 58; *Allen v. Royster*, 107 N. C., 278; *Godwin v. Watford*, 107 N. C., 168; *Clements v. Rogers*, 91 N. C., 63; C. S., 156. It appearing from the record and the findings of facts that the debts of the estate have been all paid except the Federal and State inheritance taxes and $20.00 fees due the clerk, that ample funds are in hands to meet these obligations and that the said estate is now ready for distribution—that appellant has been allowed to occupy and control the old home place free of rent for 18 months from the death of her mother and the qualification of her executors, we think the ruling of his Honor in accord with the law and right of the case and that the objection must be disallowed.

On careful perusal of the entire record we are of opinion that the decree of the Superior Court has been entered in accordance with the law applicable and that the rights and interest of all the parties have been carefully protected and provided for, and the same is

Affirmed.

SUMMIT AVENUE BUILDING CO. v. J. P. SANDERS.

(Filed 18 April, 1923.)

1. Contracts, Written—Conditions Precedent to its Binding Effect—Parol Evidence.

The principle upon which a contemporaneous verbal agreement may not be received in evidence to alter, vary or contradict the terms expressed in the contract, as written, applies when by the acts or agreement of the parties the written contract has become binding and enforceable; but where the contract has been written and its validity is made to depend upon the happening of a certain contingency, the principle does not apply, and a parol agreement to this effect may be shown in defense by a party who is sought to be held responsible for the breach of the written conditions.

2. Same.

Where a written contract of lease and option of purchase of a city lot of land for the purpose of erecting a hotel thereon within a stated period, specifying the rental and other matters included in the arrangement, has been signed by the parties, and the lessee is sued for a breach thereof, it is competent for him to show in defense to the action, that he and the lessor had previously agreed by parol that the written instrument should become effective and binding only upon his being able to interest certain persons in the building of the hotel, within a certain time, which he had been unable to do.

3. Appeal and Error—Decisions—New Trials—Law of the Case.

Where, upon a former appeal in the same case, it has been decided that the defendant could not show a contemporaneous parol agreement to vary a written contract, as a defense to an action for its breach; and it appears on the second appeal that through the amendment to his answer the defendant's testimony had been erroneously excluded on the second trial, tending to show that by a prior verbal agreement the written instrument should only be binding upon a contingency that had never occurred: *Held*, the former decision is not controlling as the law of the case upon a new trial ordered.

APPEAL by defendant from *Harding, J.*, at November Term, 1922, of GUILFORD.

Civil action to recover against defendant for rentals and damages for breach of contract shown forth in evidence as follows:

GREENSBORO, N. C., 25 October, 1919.

Memorandum of agreement between J. P. Sanders and W. E. Hackett, called the lessees, and Summitt Avenue Building Company, called the lessors.

The lessees agree to form a hotel company, to be known as the North Carolina Hotel Exchange Company, within ten days from this date.

That lessors agree to lease to said hotel company all that lot and parcel of land in Greensboro, N. C., at the southwest corner of Greene and Washington streets, being about 113.30 feet on the south side of Washington Street and 125 feet on the west side of Greene Street, for a period of eight years, at an annual rental of $6,000 payable in advance 1 January of each year, beginning 1 January, 1920. First payment to be made by promissory note of said lessees and their associates, payable 1 July, 1920, with interest at 6 per cent from 1 January, 1920, lease to provide that hotel company, which is the lessee therein, shall have the option at the beginning of the ninth year to purchase said property and hotel thereon for $8,775, payable 1 January, 1928. This option to be exercised at any time after 1 January, 1927, and is conditional on all the terms and conditions of this contract and lease to hotel company being fully performed and complied with.

It is an essential part of this agreement and to be a condition of said lease, that the lessees of said hotel company, cause to be erected on said premises a hotel of in the neighborhood of 200 rooms and to cost approximately $350,000, or more, for the building, and to furnish same with furniture equipment to cost approximately $100,000.

The note above referred to is to stand as security for the starting of the erection of said hotel on or before 1 July, 1920, and in event of failure to start erection of hotel within that time, this agreement and lease thereunder to be and become null and void, but said note, nevertheless, to be paid by the makers thereof to the Summitt Avenue Building Company.

It is understood and agreed that a formal lease is to be executed by the Summitt Avenue Building Company to the hotel company embodying the above terms and conditions, and further containing covenants by the lessees to pay all State, county, municipal or other taxes or assessments against said property or assessments for paving streets or sidewalks adjacent thereto. Said property shall not be used during continuance of lease for any other purpose other than hotel purposes, except it may have a barber shop or other stores in hotel building, and in order to entitle the lessees to exercise option and purchase said property at end of the eight years, the hotel, as hereinabove specified, must be fully built and completed during the period of lease.

There was evidence on part of plaintiff tending to establish breach and damages.

Defendant in the pleadings denied that said paper-writing had ever become a contract between the parties, and offered evidence tending to show that the same had been signed and delivered only on condition that it would not become operative or binding on the parties unless within ten days they could interest certain designated men of means in the undertaking. That defendant, after making diligent effort, failed to procure the interest or aid of the persons named, and that the contract had therefore never become a binding agreement.

The cause was submitted on the following issues:

1. Was the memorandum of agreement signed and delivered upon the condition that it was not to become a binding contract unless the defendants secured the financial assistance of Mr. Gresham and others associated?

2. Is the defendant indebted to the plaintiff, and if so, in what amount?

The court having admitted the evidence of defendant to the effect above stated, ruled that same was not competent to vary the contract as written and charged the jury that if they should believe the evidence admitted as competent, they should answer the issues for plaintiff. Verdict and judgment for plaintiff and defendant excepted and appealed.

J. S. Duncan and R. C. Strudwick for plaintiff.
Cook & Wyllie and A. L. Brooks for defendant.

HOKE, J. It appears that on a former trial of the cause, defendants admitting the execution and existence of the contract sued on, had pled by way of defense and offered evidence tending to show that there was a contemporaneous oral agreement and by virtue of which defendants were to be released of the obligation of the written agreement if they failed in interesting certain designated persons in the enterprise within ten days from its date. This claim having been established, there was judgment for defendants which on appeal was set aside, the Court being of opinion that the parol evidence on which the defense was based was incompetent as being in conflict with the terms of the written agreement. See *Building Company v. Sanders,* 183 N. C., 413. The opinion having been certified down, defendant was allowed to amend his answer so as to allege that the paper-writing sued on had never become the contract of the parties, but that same had been delivered with the express understanding and agreement that it was not to bind the parties or become operative as a contract unless and until they could within ten days interest certain men of means in the enterprise. There was evidence by defendant in support of this position, and at first received, but later his Honor, being of opinion that the evidence was incompetent as violating the written contract, same was withdrawn by him over defendant's objection, and plaintiff thereupon recovered judgment. It is held with us that "while the express terms of a written contract may not be varied by a contemporaneous oral agreement, it may be alleged and shown the delivery of the written instrument was on condition that the same should not be regarded as a contract until the happening of some contingent event." In *Bowser v. Tarry,* 156 N. C., 38, the position is stated as follows: "That although a written instrument purporting to be a definite contract has been signed and delivered, it may be shown by parol evidence that such delivery was on condition that the same was not to be operative as contract until the happening of some contingent event, and this on the idea, not that a written contract could be contradicted or varied by parol, but that until the specified event occurred the instrument did not become a binding agreement between the parties." And so expressed, the principle has been repeatedly approved and applied in our decisions. *Thomas v. Carteret,* 182 N. C., 374-378; *White v. Fisheries Co.,* 183 N. C., 228; *Mercantile Co. v. Parker,* 163 N. C., 275; *Garrison v. Machine Co.,* 159 N. C., 286; *Pratt v. Chaffin,* 136 N. C., 350. And we may not allow the argument of appellee that the contrary is the law of the case by virtue of the former opinion. That is a position that prevails

when the pleadings and evidence are the same or practically so and where there is a substantial change in both there is error and this will be certified that there may be a new trial had of the cause.

New trial.

NETA MOORE v. JAMES W. MOORE.

(Filed 18 April, 1923.)

1. **Husband and Wife—Alimony Without Divorce—Statutes—Contract of Separation—Assumption of Marital Relations—Courts—Finding of Facts.**

Where it is urged for the defendant upon his wife's application for alimony without divorce, C. S., 1667, that he and his wife had entered into a contract of separation and had not thereafter resumed the marital relation, it is competent for the husband to show the matters he relies upon his defense, but it is for the trial judge to decide the truth of the matter upon all of the evidence, though his findings are not to be received as evidence, by the jury passing upon the issue properly presented to them at the trial of the case.

2. **Same—Appeal and Error—Record—Certificate of Probate.**

Where the defendant resists his wife's application for alimony without divorce, C. S., 1667, upon the ground that there was still in effect a valid contract of separation they both had executed, and appeals from an adverse decision of the trial judge hearing the matter, the record on appeal should set out the writing of separation so that the Supreme Court may determine whether it was reasonable, just and fair to the wife, and whether in taking her acknowledgment the officer had properly certified that it was not unreasonable or injurious to her, as the Statute requires. C. S., 2515.

3. **Husband and Wife—"Subsistence"—Alimony—Attorneys' Fees—Statutes—Amendments.**

While the allowance to be made by the judge for the "subsistence" of the wife from the earnings or estate of her husband, under the provisions of C. S., 1667, in her application for alimony without divorce, is not regarded as synonymous with "alimony" and does not in terms include the allowance for attorney's fees, by recent statutory amendment the court may now allow her attorney's fees.

4. **Appeal and Error—Record—Case on Appeal—Conflicting Statements—Findings of Fact—Judgments.**

Where the record proper and the statement of the case on appeal are contradictory the record will control.

APPLICATION for alimony without divorce under C. S., 1667, heard by *Harding, J.*, at September Term, 1922, of GUILFORD.

Judgment for the plaintiff. Defendant appealed.

Wilson & Frazier and Bynum, Hobgood & Alderman for defendant.

ADAMS, J. The plaintiff and the defendant intermarried on 12 September, 1912. Thereafter the plaintiff brought suit in the Superior Court for alimony, alleging certain acts of cruelty on the part of the defendant, and 18 January, 1922, the parties agreed upon and mutually executed a deed of separation and a nonsuit was taken in the pending action. The case at bar was instituted on 31 May, 1922. In her complaint the plaintiff alleges that the defendant fraudulently induced her to sign the deed of separation, that he paid her $400 in accordance with the terms of the deed, more than half of which she returned to him immediately afterwards upon his promise to live with her in the relation of husband, and that they lived together as man and wife from 18 January to 7 March, 1922, when the defendant wilfully abandoned her, refusing to contribute anything to her support. The defendant denies almost all the material allegations of the complaint and particularly pleads the former judgment and the deed of separation in bar of the plaintiff's recovery.

The judge made an order allowing the plaintiff $35 a month *pendente lite* and $200 as counsel fees. The defendant contends that this order is invalid and unenforceable on two grounds: (1) the court was without power to render the judgment; (2) the judge did not find any facts upon which the order was made to rest.

1. As the basis of the first objection the defendant contends that the deed of separation terminated the marital relation, or at any rate that the defendant denies reassumption of the marital relation after the deed was executed and that the undenied existence of the marital relation is essential to the maintenance of the plaintiff's suit.

The doctrine announced in *Collins v. Collins,* 62 N. C., 153, has not uniformly been adhered to in the later decisions (*Sparks v. Sparks,* 94 N. C., 527; *Archbell v. Archbell,* 158 N. C., 409); but in relation to this position of the defendant there are several things suggested by the record that should not be overlooked. In the first place the deed of separation is not made a part of the complaint or answer and we have no present means of ascertaining its exact contents or of knowing whether the alleged agreement was reasonable, just and fair to the plaintiff when considered with due regard to the circumstances of the parties at the time it was made, or whether upon the examination of the plaintiff it appeared that she had freely executed and consented to the agreement and that such agreement was not unreasonable or injurious to her. C. S., 2515; *Archbell v. Archbell, supra.* Moreover, the plaintiff expressly alleges not only that the defendant fraudulently procured her execution of the articles of separation but that immediately

after affixing her signature, while she and the defendant were going in his car to the place of her residence, they effected a complete reconciliation of their differences and agreed thereafter to observe the marriage relation and live together as husband and wife. It is insisted in behalf of the plaintiff that the separation never actually took place and that the deed for this reason, even in the absence of fraud, is of no effect. See authorities cited in note to *Stephenson v. Osborne*, 90 Am. Dec., 367. We need not discuss this proposition, however, for it has been definitely decided that if the parties resume the conjugal relation the agreement is thereby rescinded. *Smith v. King*, 107 N. C., 273; *Archbell v. Archbell, supra.* "It is now well established as a general rule that a separation agreement is terminated for every purpose, in so far as it remains executory and contemplates the living apart of the spouses, where the parties subsequently becomes reconciled and return to cohabitation, and the duration of the reconciliation is immaterial." 9 R. C. L., 534 (355). If the restoration of the marriage relation rescinds the agreement the husband upon such restoration is charged with the legal duty of providing support for his wife. True, all the issues raised by the pleadings may ultimately be determined by the jury—including of course, the question of the present marital relation—but in an application for subsistence as well as for alimony the judge finds the facts.

We are aware that prior to the act of 1883, C. S., 67, in an application for alimony the complaint was taken to be true and that in *Zimmerman v. Zimmerman*, 113 N. C., 433, the Court said: "The requirement that the judge should find such allegations of the complaint to be true as would entitle the plaintiff to the order was brought into the statute by the amendatory act of 1883," and further, that the terms of the amendatory act are omitted from sec. 1667; but this section evidently contemplates the right of the defendant to be heard in opposition to the plaintiff's motion, and in *Allen v. Allen*, 180 N. C., 465, was apparently so construed. In the dissenting opinion in this case the practice in reference to finding the facts under sec. 1667 and other sections is pointed out by *Allen, J.*

From the evidence introduced the judge finds the facts for the purposes of the motion, but the facts so found are not conclusive on the parties nor receivable in evidence on the trial of the issues. And in the instant case his Honor complied with this requirement by finding from the pleadings and the affidavits offered in evidence that the facts were as alleged by the plaintiff. *Morris v. Morris*, 89 N. C., 113; *Lassiter v. Lassiter*, 92 N. C., 129; *Moody v. Moody*, 118 N. C., 926; *Barker v. Barker*, 136 N. C., 317; *Garsed v. Garsed*, 170 N. C., 672; *Easeley v. Easeley*, 173 N. C., 530; *Allen v. Allen, supra.*

Section 1667 of the Consolidated Statutes contains this paragraph: "Pending the trial and final determination of the issues involved in such action, and also after they are determined, if finally determined, in favor of the wife, such wife may make application to the resident judge of the Superior Court, or the judge holding the Superior Courts of the district in which the action is brought, for an allowance for such subsistence, and it shall be lawful for such judge to cause the husband to secure so much of his estate or to pay so much of his earnings, or both, as may be proper, according to his condition and circumstances, for the benefit of his said wife and the children of the marriage, having regard also to the separate estate of the wife."

In *Allen v. Allen, supra,* the Court held that while the sum allowed for subsistence must be left to the sound discretion of the trial judge the word "subsistence" is not synonymous with "alimony" and is not sufficiently comprehensive to include the fees of counsel, but probably in consequence of this decision the General Assembly at the session of 1921 amended sec. 1667 as to provide for counsel fees as well as subsistence. Public Laws 1921, ch. 123. *Anderson v. Anderson,* 183 N. C., 141.

2. The defendant objects to the judgment on the ground that his Honor's finding of facts was made after the original judgment had been signed and after the defendant had given notice of his appeal.

The judgment and the finding of facts consist of two separate papers, each of which was signed by the judge. It is not denied that the paper marked "judgment" was signed on 9 October, 1922, or that the statement of the case on appeal represents the finding of facts to have been signed on 21 October, 1922. However, in the record proper the paper referred to as the finding of facts bears the caption, "Finding of Facts and Order (Sept. Term, 1922)." From the record it appears that the facts were found before the judgment was rendered; and the record and the statement of the case on appeal are in this respect inconsistent. Under these circumstances the record prevails. "Where there is a discrepancy between the case on appeal and the transcript of record proper, the statements in the transcript of the record proper must be taken to be correct, and the court must be governed by that." *Farmer v. Willard,* 75 N. C., 401; *S. v. Keeter,* 80 N. C., 472; *Adrian v. Shaw,* 84 N. C., 832; *McCanless v. Flinchum,* 98 N. C., 358; *S. v. Carlton,* 107 N. C., 956; *S. v. Truesdale,* 125 N. C., 696; *S. v. Wheeler,* at this term.

Observing a long line of decisions to this effect we must hold that when tested by the record proper the finding of facts preceded the date of the judgment and presumably was the basis of the judgment rendered in the cause.

We find no error which entitles the defendant to another hearing on the questions involved in his appeal.

No error.

I. M. POWERS, ALICE HEATH, CORNELIA HALL AND HUSBAND, RICHARD HALL, CAROLINA SINGLETON, RANSOM GAVIN, MAGGIE WILSON AND HUSBAND, HENRY WILSON, v. BALAAM MURRAY.

(Filed 25 April, 1923.)

1. Deeds and Conveyances—Lost Deeds—Delivery—Registration—Title.
When a deed has once been delivered its subsequent loss or destruction will not divest the title to the grantee.

2. Same—Evidence.
If the original deed cannot be produced and it becomes necessary to offer secondary evidence of its contents, such contents must be established by "first hand knowledge" and not by testimony based upon statements made by third parties; and while such testimony when admissible is not required to be verbally precise, it must be entire as to the substance of the material parts and its legal operation.

APPEAL by plaintiff from *Cranmer, J.*, at August Term, 1923, of DUPLIN.

Civil action, brought by plaintiffs in a proceeding for the partition of two tracts of land, containing respectively 15 acres and 3 1-2 acres, and alleged that the defendant had no interest in either tract.

Hillary Murray and Margaret Powers while in slavery lived together as man and wife and afterwards complied with the act of 1866 (C. S., 2497) for the purpose of validating their union. Margaret was the mother of I. M. Powers, Alice, Phyllis, Hillary, Sam, Balaam, and Grace. Alice, Hillary, and Sam died intestate and without issue. Phyllis married David Gavin and four of their children are plaintiffs; Grace married Charles Powers and died during the lifetime of Margaret, leaving one child, the plaintiff, Maggie Wilson.

The plaintiffs offered in evidence the following deeds:

1. A deed from James Wells and wife to Margaret Murray, dated 5 March, 1881, conveying 15 acres.

2. A deed from James Wells and wife to Margaret Murray, dated 7 March, 1883, conveying 10 acres.

3. A deed from Margaret Murray to Balaam Murray, dated 4 June, 1908, conveying the 10 acres above described.

4. A deed from James Wells to Hillary Murray, Jr., dated 12 August, 1884, conveying 5 1-2 acres, which included the 3 1-2 acres described in the complaint. It was admitted that Hillary, Jr., owned this tract at the time of his death.

The plaintiffs alleged that Margaret conveyed the ten-acre tract to Balaam as an advancement. Margaret survived her husband and died 14 June, 1914.

The verdict was as follows:

1. Was the land conveyed to Balaam Murray by Margaret Murray, to wit, ten acres, intended as an advancement? Answer: "Yes."

2. What was the value of the ten acres? Answer: "$1,000."

3. Was Margaret Murray the owner of the 15-acre tract of land at her death? Answer: "No."

4. What was the value of the said 15 acres? Answer: "$1,125."

5. Did Margaret Murray execute and deliver to Hillary Murray a deed for the 15-acre tract? Answer: "Yes."

Judgment was rendered on the verdict and the plaintiffs appealed.

Stevens, Beasley & Stevens for the plaintiffs.
George R. Ward for the defendant.

ADAMS, J. It is admitted, as we understand, that if Margaret's conveyance to Balaam of the 10-acre tract was an advancement and Margaret died seized and possessed of the fifteen acres described in the complaint, Balaam has no interest in the tract last named because he claims an interest in it only as an heir at law of his brother Hillary. The defendant alleges that he and Hillary and Sam purchased and paid for the land described in the two deeds executed by James Wells and his wife and that Margaret took the title in her own name and held it in trust for them and that after Sam's death she executed the trust by conveying one tract to Balaam and the other to Hillary.

The answer further states that Margaret's deed to Hillary conveying the 15-acre tract was never registered and has been lost or destroyed if not withheld by some of the plaintiffs. For the purpose of establishing these allegations the defendant was permitted to testify at the trial substantially as follows: "I was born in 1860. Hillary Murray, (Sr.), was my father and Margaret Murray my mother. She lived in Duplin County. I have a deed from my mother for ten acres of land. She made two deeds at the same time or had Mr. Bill Joe to make them; but both were not made to me. She never made but one deed to me for the same piece of land. Mr. W. J. Boney went to my mother's house, and me and Maggie Wilson and Hillary and Margaret were present. I don't know how old Maggie was at that time; she was fixing to get married. In the presence of Maggie, Hillary, Margaret and myself Mr. Boney wrote two deeds, one for me and the other for Hillary." To the testimony relating to the deeds the plaintiffs in apt time objected.

When a deed has once been delivered its subsequent loss or destruction will not divest the title of the grantee, and its contents may be shown by competent evidence when the due execution and the loss are properly made to appear; but as the deed is the best evidence of its own con-

tents it must be produced unless it has been lost or destroyed, or is in the hands of the adverse party who fails to produce it, or unless its absence is otherwise satisfactorily accounted for. If the original cannot be produced and it becomes necessary to offer secondary evidence of its contents, such contents, including of course its legal operation, must be established by the testimony of one who has "first-hand knowledge on the subject"; for hearsay based upon statements made by third parties is not deemed sufficient to impart competent and correct information of the matter in dispute. *Propst v. Mathis*, 115 N. C., 527. This "first-hand knowledge" does not necessarily imply testimony of verbal precision, but it should embrace entirety of parts. Aside from the practical impossibility of recalling the identical words of a lost deed, they are not essential in proof of the contents. But it is necessary to prove the execution of the deed, its delivery, its loss, the material parts, and its legal operation. In *Taylor v. Riggs*, 1 Peters, 591, p. 600, *Chief Justice Marshall* observes: "When a written contract is to be proved, not by itself, but by parol testimony, no vague, uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in court who makes a claim which he cannot support. When parties reduce their contract to writing the obligations and rights of each are described and limited by the instrument itself. The safety which is expected from them would be much impaired if they could be established upon uncertain and vague impression made by a conversation antecedent to the reduction of the agreement." And in *Plummer v. Baskerville*, 36 N. C., 252, *Chief Justice Ruffin* uses this language: "It may at once be stated that sufficient inquiry appears to have been made for this instrument, if it ever existed, to authorize the declaration of its loss. Still it is incumbent on the plaintiffs to show its existence at one time and its contents. At law the existence of an instrument as a genuine one is shown by proving its execution according to the nature of the instrument, that is to say, by the subscribing witness, if there be one, or by proof of handwriting. This is ordinarily true in equity also. *Goodees v. Lake*, 1 At., 246. It cannot be otherwise, for in reason as well as in law things which do not appear must be regarded as if they did not exist. After it be thus shown that the instrument existed its operation and effect may be established by proving the contents by the best evidence in the party's power, such as an examined copy, the registry of it, or the oral testimony of witnesses who can state the contents, or the admission of its contents by the person executing it." In *Fisher v. Carroll*, 41 N. C., 485, *Judge Pearson* adds that the strictest and clearest proof will be required if the execution or contents of the written instrument are denied. 4 Chamberlain's Mod. Law of Ev.,

2708; 3 Wigmore on Ev., 2105; McKelvy on Ev., 272, *et seq.; Plummer v. Baskerville, supra; Deans v. Dortch,* 40 N. C., 331; *Loftin v. Loftin,* 96 N. C., 95; *Jennings v. Reeves,* 101 N. C., 447; *Gillis v. R. R.,* 108 N. C., 441; *Jones v. Ballou,* 139 N. C., 526.

The defendant's testimony falls short of these requirements. It will be noted that only one of the plaintiffs was present when Boney wrote the two deeds. There is no evidence that the defendant read the deed which was delivered (as he says) to Hillary or that he could read; so far as the record shows his testimony was hearsay. He did not testify that diligent search had been made or that the deed had been lost or destroyed; nor did he trace it into the hands of either of the plaintiffs. He alleged that the plaintiffs have it, but served no notice to produce it, and laid no adequate foundation for proof of its legal operation. Nevertheless, the jury were permitted to consider this testimony and that of Rivenbark, which as it now appears in the record is subject to the same objection; and upon their testimony the jury no doubt responded to the third and fifth issues. In overruling the objection of the plaintiffs as to the evidence concerning the execution and loss of the deed there was error which entitles them to a new trial.

New trial.

J. W. SEXTON v. A. R. FARRINGTON, MARY FARRINGTON, HIS WIFE, AND WALTER FARRINGTON.

(Filed 25 April, 1923.)

1. Pleadings—Interpretation—Statutes.

The common law rule that every pleading shall be construed against the pleader has been materially modified by our statute, C. S., 535, whereunder the allegations of a pleading shall be liberally construed with a view of substantial justice between the parties; and a complaint will not be overthrown by demurrer unless it is wholly insufficient to state a cause of action, or unless it appears that the plaintiff has not shown sufficient ground for relief in law or equity.

2. Same—Judgments—Fraud—Trusts.

The plaintiff brought action to subject certain lands of one of the defendants to the lien of his judgment, alleging that this defendant had mortgaged the *locus in quo* and had furnished the money to the purchaser at the foreclosure sale, who thereupon had conveyed the lands to the codefendants, the wife and stepson of the defendant, the original owner, in fraud of the plaintiff's right: *Held,* sufficient to permit of parol evidence upon the question of the relation of trustees and *cestui que trust* between the defendants, and to subject the equitable interest of the defendant, the beneficial owner, to the payment of the judgment.

3. Same—Limitation of Actions.

A suit to declare one of the defendants in execution the equitable owner of lands for the purchase of which he has furnished the price and his codefendants trustees, is barred by the ten-year statute of limitations. C. S., 445.

APPEAL by plaintiff from *Finley, J.*, at July Term, 1922, of ASHE.

Civil action. On 20 April, 1906, the plaintiff and his wife executed to the defendant A. R. Farrington a deed for a tract of land containing 42¾ acres, and, on 21 April, Farrington executed his two promissory notes to the plaintiff to secure the remainder of the purchase price. Before these notes became due A. R. Farrington and his wife on 11 February, 1907, in order to secure the sum of $425, executed to Lucy A. Dancy a mortgage on this land, and on 16 February, 1907, it was duly registered. On 9 June, 1908, the plaintiff recovered judgment against A. R. Farrington on his two notes for $145.53 and $182.50 respectively, with interest and cost, and the judgments were duly docketed in the clerk's office. The mortgagee sold the land on 29 August, 1910, and executed a deed to G. L. Park, the purchaser, and on 27 July, 1912, Park and his wife executed to the defendants Walter Farrington and Mary Farrington a deed for the land, which was duly registered.

The plaintiff brought suit against the defendants on 3 February, 1915, and on 15 April, 1918, took a nonsuit, and on the same day issued a summons which was the beginning of this action.

Mary Farrington is the wife of A. R. Farrington and Walter is his stepson.

The cause came on for trial and at the conclusion of the plaintiff's evidence the action on defendants' motion was dismissed as in case of nonsuit, and the plaintiff appealed.

T. C. Bowie for plaintiff.
Park & Johnson and R. A. Doughton for defendants.

ADAMS, J. The defense relied on may be reduced to two propositions: (1) The plaintiff's action is prosecuted to obtain relief on the ground of fraud and is barred by the three-year statute of limitations; (2) while the first summons was issued within three years from the time the cause of action accrued the second was issued after the expiration of this period and when the second suit was brought the cost incurred in the first had not been paid.

In consideration of the contentions with respect to the first proposition it becomes necessary to examine the complaint for the purpose of ascertaining the scope and effect of the allegations therein and the nature of the action stated and in doing so to keep in mind the statutory pro-

vision that in the interpretation of a pleading its allegations shall be liberally construed with a view to substantial justice between the parties. C. S., 535. This statute, it has been held, materially modifies the common law rule that every pleading shall be construed against the pleader and approves the doctrine that any relief may be granted which is consistent with the allegations in the complaint and embraced in the issues joined, although other and different relief may be sought by the pleader and demanded in the prayer for judgment. *Brewer v. Wynne,* 154 N. C., 468; *Wood v. Kincaid,* 144 N. C., 393; *Wright v. Ins. Co.,* 138 N. C., 488. In *Hartsfield v. Bryan,* 177 N. C., 168, the Court said: "A complaint will be sustained as against a demurrer, as we have held, if any part presents facts sufficient to constitute a cause of action, or if facts sufficient for that purpose can be gathered from it, under a liberal construction of its terms. *Blackmore v. Winders,* 144 N. C., 212; *Bank v. Duffy,* 156 N. C., 83; *Eddleman v. Lentz,* 158 N. C., 65; *Hendrix v. R. R.,* 162 N. C., 9. We said in *Bank v. Duffy, supra,* that a complaint will not be overthrown by demurrer unless it is wholly insufficient—that is, if from all its parts we can see that there is a cause of action and sufficient ground for relief in law or equity."

In the fifth paragraph of the complaint, it is true, the plaintiff alleges that the defendant A. R. Farrington with intent to hinder, delay, and defeat the plaintiff's collection of the judgments procured the execution of the deed to Walter Farrington and Mary Farrington; but he further alleges that the purchase money was paid by the defendant A. R. Farrington, or furnished by him and actually paid by another for his benefit, and that all the defendants participated in the fraudulent scheme. With a view to substantial justice we may construe the complaint as alleging that between the grantees Walter Farrington and Mary Farrington and their codefendant, A. R. Farrington, there exists the relation of trustees and *cestui que trust*—that the grantees have the legal and the other defendant the beneficial title to the land described in the deed made by Parks. In accordance with these allegations the plaintiff contends that the jury should be permitted to say whether the purchase was made and the money was paid by A. R. Farrington, the legal title vesting in his wife and stepson, and under proper instructions whether upon all the evidence a resulting trust for the benefit of A. R. Farrington is raised by implication or construction of law. Bispham's Principles of Eq., 20, 79; *Ducie v. Ford,* 138 U. S., 587; *Pegues v. Pegues,* 40 N. C., 419; *Hargrave v. King, ibid.,* 431; *Cunningham v. Bell,* 83 N. C., 328; *Thurber v. La Roque,* 105 N. C., 301; *Gorrell v. Alspaugh,* 120 N. C., 362; *Avery v. Stewart,* 136 N. C., 426; *Harris v. Harris,* 178 N. C., 7; *Lefkowitz v. Silver,* 182 N. C., 339; *Bank v. Scott,* 184 N. C., 314. (The criticism of *Thurber v. La Roque, supra,*

in *Michael v. Moore,* 157 N. C., 467, has reference to the investment of an insolvent husband's money in improvements on his wife's land.)

At the trial the plaintiff offered with other record evidence the deed to Walter Farrington and Mary Farrington and produced oral evidence tending to show that the purchase money was paid by the defendant A. R. Farrington for his own benefit. We think the court should have submitted this and other evidence to the jury in order to determine whether A. R. Farrington was the equitable owner of the land as contended. If the response of the jury should be favorable to the plaintiff he would then claim the right to subject the interest of the beneficial owner to the payment of the judgments. *McKeithan v. Walker,* 66 N. C., 95; *Hutchison v. Symons,* 67 N. C., 156; *Wall v. Fairley,* 77 N. C., 105; *McCaskill v. Lancashire,* 83 N. C., 393; *Trimble v. Hunter,* 104 N. C., 130; *Mayo v. Staton,* 137 N. C., 670; *Johnson v. Whilden,* 166 N. C., 104.

From this view of the case it results that the action is not barred by the statute of limitations. Primarily the object of the suit is to have the two grantees in the deed from Parks declared trustees and their codefendant declared the real owner in equity of the land in controversy; and an action which is prosecuted to have a party declared a trustee is barred by the lapse, not of three, but of ten years. C. S., 445; *Lynch v. Johnson,* 171 N. C., 611; *Phillips v. Lumber Co.,* 151 N. C., 520; *Norcum v. Savage,* 140 N. C., 472. The plaintiff's cause of action accrued 27 July, 1912, when Parks conveyed the legal title to his grantees, and the second summons was issued on 15 April, 1918. It is therefore immaterial whether the cost of the first action was paid after nonsuit and prior to the time the second summons was issued. The second suit was brought within ten years after the cause of action accrued. *Bradshaw v. Bank,* 172 N. C., 632; *Rankin v. Oates,* 183 N. C., 517.

Upon the evidence appearing in the record the judgment of nonsuit is

Reversed.

ELLA HUDSON v. THE SINGLETON SILK COMPANY, AND THE ANSON REAL ESTATE AND INSURANCE COMPANY.

(Filed 25 April, 1923.)

Landlord and Tenant—Defects on Premises—Personal Injury—Covenants to Repair—Leases—Damages.

The tenant cannot hold his landlord liable for personal injuries to himself or his family by reason of defective conditions on the leased premises on which they live, in the absence of his express covenant to

repair; and under the general rule applicable a liability of this character will not usually be imputed. The question as to whether a recovery may be had by the tenant under exceptional covenants or circumstances is not presented on this appeal.

Appeal by plaintiff from *Long, J.*, November Term, 1922, of Anson.

Civil action to recover damages for personal injuries caused by the alleged negligence of the defendants, landlord and owners of the property, in failing to keep the premises in proper repair. At the close of plaintiff's evidence on motion there was judgment of nonsuit, and plaintiff excepted and appealed.

Parker, Stewart, MacRae & Bobbitt for plaintiff.
McLendon & Covington for the Anson Real Estate Company.
Robinson, Caudle & Pruette for the Singleton Silk Company.

Hoke, J. In the absence of an express covenant to repair or keep in repair, a landlord is not ordinarily held liable for personal injuries to the tenant or his family by reason of defective conditions of the premises. And even with a covenant to repair, the general rule is that such a liability will not usually be imputed. And it is not required to discuss or determine whether an action of this kind will lie against the landlord under exceptional covenants or circumstances, for if this be conceded, on careful perusal of the record we are of opinion that in the instant case there are no facts in evidence that will justify or permit the inference that the alleged breach of an agreement to repair was the proximate cause of the injury complained of, nor even that it caused the injury to plaintiff. The judgment of his Honor directing a nonsuit is therefore

Affirmed.

W. P. McRAE v. L. G. FOX et al.

(Filed 25 April, 1923.)

1. Evidence—Defense—Nonsuit—Burden of Proof.

Where the plaintiff moves for judgment as of nonsuit upon the defendant's evidence tending to show that by mutual mistake he had not endorsed the note sued on "without recourse," the burden of this issue is on the defendant, and the evidence should be taken in the light most favorable to him; and the motion will be denied if so construed, there is sufficient evidence to sustain his defense.

2. Correction of Instruments—Negotiable Instruments—Endorsements—Mutual Mistake.

In an action by the holder of a note against an endorser it may be shown by the defendant that the plaintiff had acquired the note upon

the distinct agreement that it was to be without recourse on him, and by the mistake of the parties it had been endorsed by him otherwise.

3. Same—Instructions—Sufficiency of Proof—Equity.

Where the endorser on a negotiable note defends an action thereon by the holder, on the ground that the latter was to accept the note "without recourse," and by mutual mistake he had otherwise endorsed it by writing his name on the back thereof, and the character of his evidence is fully sufficient to sustain his defense, a charge of the court is not error to the plaintiff's prejudice, that the burden is on the defendant to show his defense by "clear and convincing proof," when taken with the other relevant portions of the charge, construed as a whole, his language necessarily implied, and the jury must have so understood, that it required proof that was "cogent" or "strong," etc.

ADAMS, J., did not sit.

APPEAL by plaintiff from *Long, J.*, November Term, 1922, of RICHMOND.

On 12 April, 1920, G. W. Lee and wife executed and delivered to Paul R. Yountz two notes aggregating $3,000, and to secure payment thereof executed a deed of trust on certain lands in Richmond County. Yountz thereafter endorsed the bonds over to T. T. Cole and Cole endorsed the same "without recourse" to the defendant, L. G. Fox. In the summer of 1920 negotiations were had between the plaintiff McRae and the defendant Fox which resulted in the sale by McRae to Fox of a house upon a lot in Rockingham, in payment for which Fox endorsed and assigned to the plaintiff, McRae, said bonds.

Default having been made in the payment of said bonds, McRae instituted suit against Lee and wife to recover judgment against him as maker thereof and to foreclose the deed of trust to secure the same, and Fox was made a party defendant to enforce his personal liability as endorser. There is no defense by Lee and wife but Fox answered alleging that under the agreement between the parties McRae was to accept an endorsement of said bonds without recourse on defendant, Fox, and that the words "without recourse on me" were omitted when Fox endorsed the same, by mutual mistake between the parties.

The issue of mutual mistake was the only controversy between the parties and the only issue submitted to the jury. Verdict in favor of defendant; judgment and plaintiff appealed.

J. C. Sedberry, McIntyre, Lawrence & Proctor for plaintiff.
W. Steele Lowdermilk, Bynum & Henry for defendants.

CLARK, C. J. The following issue was submitted to the jury: "Did the defendant, L. G. Fox, endorse the bonds declared on, leaving out the words 'without recourse to me' by mutual mistake between himself and the plaintiff, W. P. McRae, as alleged in his answer?"; to which the

jury responded "Yes." The appeal presents two questions for our consideration. The plaintiff assigned as error that the court overruled the motion to nonsuit. The evidence must be taken on such motion in the light most favorable to the defendant upon whom rested the burden of proving this issue.

The defendant, Fox, testified that after he became the holder of the bonds, the plaintiff began negotiations with him for a certain house in the town of Rockingham for which McRae asked $2,500; that after some conversation about the matter, Fox testified that he told the plaintiff, McRae, that he had $3,000 in bonds that had been transferred to him by T. T. Cole and which were secured by mortgage against G. W. Lee on 140 acres of land near Rockingham; that he did not know anything about the land or its value but that he would give McRae the bonds for the house; that McRae insisted that Fox buy the house and give him his note which Fox did not agree to but that he would give the $3,000 in bonds; that McRae then suggested that Fox endorse them, to which Fox testified that he replied that if he did this he would be just as liable as if he had given McRae his individual note. Fox testified further that McRae then asked to take the bonds to the bank so that he might inquire about the value of the land secured thereby and later brought the bonds back to Fox and told him that he would take them on the trade for the house; that Fox had told him that he would not endorse the notes but that he would trade with him if he would take the bonds and relieve him of any further liability thereon, to which Fox said he replied that McRae said "all right." He said he got the bonds out and looked at them and the endorsement thereon was "Pay to L. G. Fox without recourse to me. (Signed) T. T. Cole"; and thereupon he signed his name thinking that the bonds under the agreement between him and McRae was that he was assigning them without recourse and he wrote on them simply "Pay to W. P. McRae" and signed his name.

He further testified that when McRae brought the bonds back after he had shown them to the bank, as above stated, he kept them for two or three weeks when McRae having moved the house over upon Fox's lot, which was a part of their agreement, he signed his name on the back of the bonds and sent them to McRae; that McRae asked $2,500 for the house and the agreement was that he was to take the $3,000 notes without endorsement by Fox for the house.

The plaintiff, W. P. McRae, testified there was nothing said about the notes being endorsed without recourse. There was full testimony by both parties and the jury found the issue in favor of Fox.

We cannot sustain the contention of the plaintiff that the motion for nonsuit should have been granted. There was very full evidence on

both sides; the issue was squarely raised and the jury found in favor of the defendant.

The plaintiff further contends that the court did not charge that the burden was on the defendant to prove the mutual mistake by evidence that was "clear, strong and convincing." The court charged the jury three times upon this proposition. He said that "as the plaintiff alleges, the burden is upon Fox to prove it (the mutual mistake) and show by evidence that shall produce satisfaction to the mind upon all the evidence that there was a mutual mistake between Fox and McRae." Again the court charged the jury: "Has he satisfied you on that so that you can say and are satisfied that it was a mistake at the time—a mutual mistake between him and McRae; that is what he alleges now, and if he has satisfied you of it as the face of the paper has not those words (without recourse) and he has alleged there was mistake, I stated to you that the burden was upon him to satisfy you that there was a mistake and the kind of mistake he alleges there was."

And again the court charged the jury: "Has he satisfied you by the evidence, clear and convincing, that those words should have been there? If the defendant has so satisfied you and this in the manner which I have explained to you, your answer to the issue should be 'Yes.' If he has failed to so satisfy you, your answer to this issue should be 'No.'"

It is true that the usual phrase is "clear, strong and convincing" but these exact words are not absolutely indispensable. They are not "sacramental words," *S. v. Arnold*, 107 N. C., 862, but it is sufficient if the expression used conveyed to the minds of the jury the same meaning. The use of the words here "clear and convincing" together with the twice repeated expression that unless the jury was so satisfied "in the manner in which he had explained to the jury," that is by "clear and convincing" evidence that they should answer the issue "No," was sufficient.

In *Mendenhall v. Davis*, 72 N. C., 150, it was held that parol evidence was admissible to show that an endorsement in blank was made with the understanding that it was to pass the title and without any assumption of liability. In *Comrs. v. Wasson*, 82 N. C., 308, it was held that an endorsement could be construed as simply passing the title. The plaintiff's contention, however, does not seem to controvert that proposition but rests upon the ground that the charge "Has he satisfied you by the evidence, clear and convincing" was not sufficient, but was defective because of the omission of the further word "strong" or "cogent."

In *S. v. Arnold*, 107 N. C., 862, in discussing the words for which no synonyms can be substituted in indictments, it was held that while "feloniously," "with malice aforethought," and "murder" are essential

to the validity of the indictments requiring them, that there were no other "sacramental words," that is, words which admitted of no substitute and especially that "wilfully and unlawfully" could be expressed by other words conveying the same idea.

The entire controversy depended solely upon the question whether the words "without recourse" were omitted by mutual mistake. On this there was a direct conflict of evidence and when the jury were told to find the issue in the negative unless they were satisfied by clear and convincing proof, they must have understood this required proof that was strong and cogent. While it is best always to follow the customary expressions and terms, if for no other reason because it will avoid such debates as this and will prevent experiments in language—whether in civil or criminal cases—we do not see that the expression "clear and convincing proof" which would satisfy the jury, was not sufficient to convey to their minds the same idea that would have been conveyed if the additional word "strong" or "cogent" had been used.

It is more probable that the testimony of defendant that the plaintiff asked $2,500 for the house (and the plaintiff admitted it was $2,750) was clear and convincing to the jury that $3,000 in bonds, with the interest thereon, was agreed upon because not endorsed.

We have held frequently and consistently that the charge of the court should be construed in its entirety and not by any detached portions.

Taking the evidence of the defendant, Fox, and that of the plaintiff, together with the charge of the court, we think that the controverted point together with the necessary intensity of proof required, must have been fully understood by the jury and that they found the issue intelligently and understandingly and we cannot on appeal disturb the verdict merely because the word "strong" (or "cogent") was not added to the phrase that the proof must be "clear and convincing."

No error.

ADAMS, J., did not sit.

WALKER, J., dissented upon the ground: 1. That there is no evidence of a mutual mistake, or any mistake, as understood in the law, by L. G. Fox, and certainly none by W. P. McRae, and therefore there was no mutual mistake, and the court should have granted the motion to nonsuit.

L. G. Fox signed the very endorsement he intended to sign, and did so not mistakenly, in the sense of a mistake in fact, but because he thought that, as T. T. Cole had the words "without recourse" in his endorsement, it would import the same words into his own endorsement. But in this he was mistaken, not in fact, but only in law, and that will

not do; because, for one good reason, W. P. McRae did not participate even in that mistake. What L. G. Fox needed was a lawyer, when he would have had better advice than his own. Whoever has himself for his lawyer, is apt to have an unwise man for his client, is the old, old adage.

2. The charge of the court, based upon the defective evidence, was also erroneous, and necessarily so.

3. It is well settled that there must be a mutual mistake of the parties or the mistake of one induced by the fraud, surprise, etc., of the other, which is not alleged here. *White v. R. R.*, 110 N. C., 456; *Day v. Day*, 84 N. C., 408; *Jones v. Warren*, 134 N. C., 390; *McMinn v. Patton*, 92 N. C., 371, 374; *Wilson v. Land Co.*, 77 N. C., 445; *Britton v. Ins. Co.*, 165 N. C., 149, and more recently, *Ray v. Patterson*, 170 N. C., 226; *Newton v. Clark*, 174 N. C., 393. Where mistake alone is relied on, it must be both alleged and shown that it was a mutual one, and that the matter asked now to be supplied, or inserted, was omitted by reason of a mutual mistake. *Ray v. Patterson, supra; Newton v. Clark, supra.*

NATIONAL LIFE INSURANCE COMPANY v. A. D. GRADY, ADMR. OF N. B. GRADY, DECEASED.

(Filed 2 May, 1923.)

1. Insurance, Life—Policies—Contracts—Stipulations—Conditions—Good Health—Delivery of Policy—Fraud and Collusion.

A clause in the application for a policy of life insurance to become a part of the policy contract when issued, that it will be invalid unless the premium shall be paid on its delivery while the applicant is in good health, is executory until delivery of the policy by the company's authorized agent, and is for the purpose of protecting the company in the event the applicant should theretofore, and since the acceptance by the company, become sick or in ill health; and where the policy has been delivered to the insured or his representative and the premium paid to the company's accredited agent, in the absence of collusion or fraud, the policy becomes a binding contract on the company, irrespective of this clause.

2. Same—Principal and Agent—Ill Health—Notice to Agent.

Where the application for a policy of life insurance provides that the application therefor shall become a part of the policy when issued, and specifying that the policy would be invalid unless the first premium shall have been paid and the policy delivered to the insured while in good health, it is required of the company's authorized agent to deliver the policy and accept the premium, that he satisfy himself of the good health of the insured before making delivery, and in the absence of fraud and collusion between the insured and the agent, the knowledge of the agent

when acting within the scope of the powers entrusted to him, will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same.

3. Same.

The insured during ill health sent his representative to the local agent of the company to whom the company had, according to custom, sent the policy for its delivery and the collection of the first premium; and informed the company's agent that the insured was in ill health, which afterwards resulted in his death, and the agent unconditionally delivered the policy and collected the premium without inquiry as to the health of the insured at that time. There was a clause in the application for the policy, incorporated in the policy itself, that the validity of the policy contract was conditioned upon the continued good health of the insured and his paying the first premium. There was no evidence of fraud by the insured or collusion by him or his representative with the agent, but to the contrary, and *held*, the knowledge or notice of the agent of the ill health of the insured was imputed to the company, and the unconditional delivery of the policy by the agent under the circumstances rendered the policy binding upon the company, and enforceable.

APPEAL by plaintiff from *Calvert., J.,* January Term, 1923, of DUPLIN.

Civil action to cancel an insurance policy of $2,000, on the life of defendant's intestate, issued and delivered in 1920, on the ground that at the time of said delivery the intestate was not in good health, in breach of stipulation of the kind appearing in the application, and which purported to be a part of the contract of insurance. Defendant answered, asserting the validity of the policy and demanding judgment for amount of same. On the trial plaintiff, among other things, put in evidence the contract purporting to bear date 1 September, 1920, insuring the life of intestate in the sum of $2,000, issued in consideration of the application therefor and the payment of a premium of $60.22 on delivery and of a like sum on or before the first of September in every year during the life of the insured, etc. Said policy further contained stipulations as follows: "POLICY THE ENTIRE CONTRACT. This policy and its application, which is made a part hereof and a copy of which is hereon endorsed, together with general provisions contained on the reverse of this page, which are hereby made a part of this policy, as fully as if they were recited at length over the signatures hereunto affixed, constitute the entire contract between the parties." And further: "ALTERATIONS. No one except the president, a vice-president, secretary or actuary of the company, has power, in behalf of the company, to make or modify this policy, to extend the time for paying any premium, to waive any forfeiture, or to bind the company by making any promises or by accepting any representation or information not contained in the application for this policy. These powers will not be delegated." And in the application, made a part of the policy and attached thereto,

appears the following: "I hereby agree that this application and the answers made to the medical examination and the policy applied for shall constitute the entire contract between the parties thereto. (Signed) Needham Bryant Grady." "I hereby certify that I have read all statements and answers in this application (Forms A and B), and agree, on behalf of myself and of any person who shall have or claim any interest in any contract issued thereunder: That no material circumstances or information has been withheld or omitted touching my past and present state of health and habits of life, and that said statements and answers, together with this declaration as well as those made to the company's medical examiner, are complete and true and shall be the basis of the policy hereby applied for; that there shall be no contract of insurance until a policy shall have been issued and delivered to me and the premium thereon paid to the company or its authorized agent, during my lifetime and good health. (Signed) Needham Bryant Grady." There were also facts in evidence tending to show that the intestate, living about twelve miles from Warsaw, N. C., held a policy of $1,000 in plaintiff company. That in latter part of 1920, and on application for a second policy for $2,000 in the company, same was passed upon favorably and the policy for said amount, the subject of this controversy, sent to the local agent J. D. Brown, resident in Warsaw, N. C., for delivery on payment of the premium, etc. That intestate not being presently able to pay, an indulgence was allowed, the local agent retaining the policy. That on Monday, 25 October, 1920, the intestate was in the town of Warsaw, saw the local agent who requested him to take up his policy, but further indulgence was asked for and allowed, intestate saying that he had to take up some notes at the bank and it was not presently convenient to pay. It appeared further from evidence of defendant that at second meeting in Warsaw, intestate complained of not being well, and that fact was made known to the local agent. The facts in evidence further tended to show that on his return home, 25 October, intestate became gradually worse from day to day and died late afternoon, Thursday, 28 October; that the attending physicians seemed to be perplexed by the symptoms of the case but the disease was finally diagnosed as influenza. There was evidence to the effect further that on Monday, 26 October, the local agent having received a letter from H. M. Humphrey, State manager to that effect wrote to intestate addressed to his home office, in terms as follows:

MR. N. B. GRADY, Kenansville, N. C.

DEAR SIR:—Mr. H. M. Humphrey, State manager, writes me that the 45 days he gave you to take up the policy has expired, so please call by and get same, as he writes me that I will have to return the policy unless you take it at once. Very truly yours,

(Signed) J. D. BROWN.

That the letter was received in afternoon 27th, and early on morning of 28th intestate sent the money for the policy by a neighbor, Mr. Tilden Summerlin, who testified that he took the premium money to Warsaw early Thursday morning and told Mr. Brown that Mr. Grady had sent him to get the policy, paid him the premium $60.22, and Mr. Brown handed him the policy. That he could not say whether just before or just after, but about the time he handed me the policy he asked how Needham was (the intestate) and witness replied that he was very sick. On cross examination he said he couldn't swear whether Brown heard him or not. There was supporting evidence for defendant tending to show that the agent knew of his condition. The agent, J. D. Brown, testifying for plaintiff, stated among other things that he didn't see intestate on 25, Monday, and that neither then nor on Thursday when the policy was delivered or any other time was he made aware of the sickness of the intestate. This opposing evidence was submitted to the jury and under the charge of his Honor they have accepted defendant's version, he having instructed the jury, in effect, that if at the time J. D. Brown delivered the policy and received the premium he knew the intestate was sick, this would be a waiver of the stipulation "that there should be no contract of insurance until the policy shall have been delivered during the lifetime of the insured and while he was in good health, etc." The cause was submitted and verdict rendered on the following issue:

"Is the plaintiff entitled to the cancellation and return of the policy for $2,000 on the life of the deceased, N. B. Grady? Answer: 'No.'"

Judgment for the amount of the policy and plaintiff excepted and appealed.

E. M. Land and H. D. Williams for plaintiff.
Stevens, Beasley & Stevens and Duffy & Day for defendant.

HOKE, J. The authorities on the subject in this jurisdiction are to the effect that where on payment of the first premium a policy is delivered without qualification there is a completed contract of insurance, and the parties thereto are concluded as to a delivery of the policy during the good health of the insured, except in case of fraud. These decisions proceed upon and approve the position that the clause in the application, made a part of the policy, and stipulating that there shall be no contract of insurance except on delivery in good health, is executory in its nature, authorizing the company to withhold the policy in case the insured shall be taken ill before delivery, but where the policy has been finally delivered the company is concluded on this and other stipulations of like kind except, as stated, where there has been fraud on

the part of the insured, or those representing him in the transaction. *Trust Co. v. Ins. Co.*, 173 N. C., 558-563; *Rayburn v. Casualty Co.*, 138 N. C., 379; *Grier v. Ins. Co.*, 132 N. C., 546; *Ray v. Ins. Co.*, 126 N. C., 166; *Kendrick v. Ins. Co.*, 124 N. C., 315. In *Trust Co. v. Ins. Co., supra, Associate Justice Allen* delivering the opinion, and in reference to the subject said: "Nor do we agree to the position that the defendant can avail itself of the plea that the insured was not in good health at the time of the delivery of the policy, and that for this reason, under the terms of the policy the contract never became operative."

If any length of time elapses between the making of the application and the issuing of the policy it is the duty of the defendant to make inquiry when the policy is delivered as to the condition of the health of the insured; and if it fails to do so, the delivery is conclusive against the defendant as to the completion of the contract.

It was so decided in *Grier v. Ins. Co.*, 132 N. C., 546, in which the Court said: "When the policy is not only issued, but delivered, its delivery (in the absence of fraud) is conclusive that the contract is completed (*Ray v. Ins. Co.*, 126 N. C., 166), and it is an acknowledgment of payment during continuance in good health. If the agent had not delivered the policy, whether the circumstances would have justified the withholding of the delivery so as to release the company from responsibility is not a matter before us. He did deliver it, and with full opportunity to see the insured and with a suggestion that he do so, and there is no allegation of fraud and collusion, as in *Sprinkle v. Indemnity Co.*, 124 N. C., 405. The delivery of the policy closed the contract like the delivery of any other deed, and the preliminary provisions of the application for withholding thereof ceased to be of any force. In *Kendrick's case, supra*, the money was not paid till after a lingering illness and on the very day of the death, and then by a friend; but it was held that the delivery of the policy was conclusive as to the contract being complete.

"Numerous authorities can be cited in support of what is here said, but the matter has been sufficiently elaborated in *Kendrick v. Ins. Co.*, 124 N. C., 315; 70 Am. St. Rep., 592. To same purport, *Life Assn. v. Lindley*, (Texas), 68 S. W., 695; *Indemnity Assn. v. Grogan*, (Ky.), 52 S. W., 959; *Ins. Co. v. Kochlar*, 63 Ill., App., 188; *Ins. Co. v. Schlink*, 175 Ill., 284; *Ins. Co. v. Quinn*, 41 N. Y., Supp., 1060; *McElroy v. Ins. Co.*, 94 Fed., 990. In *Life Assn. v. Findly* and *Indemnity Co. v. Grogan* the facts were identical, almost, with those in this case. The actual delivery of the policy concludes the contract, in the absence of fraud."

In *Grier v. Ins. Co.*, and in *Ray v. Ins. Co.*, it was held "that when the policy of insurance is delivered, its delivery, in the absence of fraud, is conclusive that the contract is completed and is an acknowledgment

that the premium was paid during the good health of the insured." And the present *Chief Justice* delivering the opinion in the *Grier case,* said: "The provision in the application that the contract shall not take effect until the first premium shall have been paid, during the applicant's continuance in good health, is only a provisional agreement, authorizing the company to withhold the delivery of the policy until such payment in good health; but when the company actually delivers the policy, then it is estopped, in the absence always of fraud, to assert that its solemn contract is void either on account of nonpayment of premium or of ill health, which stipulations were asserted in the application as conditions to excuse it from such delivery, and are not grounds to invalidate the policy after it has been delivered."

Another principle recognized in this jurisdiction and pertinent to the inquiry is that, in the absence of fraud or collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same. *Gardner v. Ins. Co.,* 163 N. C., 367; *Fishblate v. Fidelity Co.,* 140 N. C., 589; *Grabbs v. Ins. Co.,* 125 N. C., 389; *Follette v. Accident Assn.,* 110 N. C., 378; *Connecticut Indemnity Assn. v. Grogan's Admr.,* 52 S. W., 959; *McElroy v. British America Assur. Co.,* 94 Fed., 990; *Northwestern Life Assur. v. Findley et al.,* 68 S. W., 695; *Germaine Life Ins. Co. v. Koehler,* 63 Ind. App., 188. In *Fishblate's case, supra,* the Court in speaking to the question said: "We are not inadvertent to the clause in the policy which provides that 'no notice or knowledge of the agent or any other person shall be held to effect a waiver or change in this contract or any part of it. . . .' The effect of a clause of this kind has been very much discussed in the courts, and there is high authority for the position that to ignore such a stipulation would be to place an undue limitation on the right of contract, and to threaten the sanctity of written instruments by breaking down the rule that such contracts cannot be changed or varied by parol. But we think the great weight of authority, certainly in the State courts, favors the position that a clause of this character is ineffective for the purpose designed and that an insurance company shall not appoint an agent, use his services, accept the results of his work, and repudiate this essential and inherent feature of the law of agency, that a knowledge of the agent is the knowledge of the company." A proper application of these principles to the facts presented is in favor of defendant's recovery on the policy. There is no suggestion of any collusion between the agent and the insured, nor is there any allegation or evidence tending to show fraud or any concealment from which fraud might be inferred, on the contrary it appears, and under the charge of

his Honor, the jury has necessarily found that on payment of the premium there was unqualified delivery of the policy, the agent at the time having knowledge or notice of the conditions presented.

There is no error, and the judgment for defendant is

Affirmed.

JOSEPH M. WRIGHT v. JAMES C. DAVIS, DIRECTOR GENERAL AND AGENT OF THE CHESAPEAKE AND OHIO RAILROAD COMPANY, AND THE PULLMAN COMPANY.

(Filed 2 May, 1923.)

1. **Government—Railroads—Principal and Agent—Summons—Process.**

   The courts of this State will take judicial notice that under the provisions of the Federal Transportation Act the President appointed an agent for the management of certain railroad companies in substitution of the powers of the director general of railroads; and an action will not be dismissed as of nonsuit by reason of a summons having been served on the carrier's local agent entitled in the name of the plaintiff against "J. C. Davis, director general and agent," the defendant so named having entered a general appearance accordingly and defended upon the merits of the case.

2. **Appeal and Error—Summons—Service—Motions—Objections and Exceptions.**

   An appeal to the Supreme Court will not directly lie from the refusal of the Superior Court judge to dismiss an action upon the ground of improper service, but upon exception taken the matter will be considered on appeal from a final judgment.

APPEAL by defendants from *Harding, J.*, at November Term, 1922, of GUILFORD.

The verdict for plaintiff upon the issues submitted and judgment. Appeal by defendants.

J. A. Barringer and R. C. Strudwick for plaintiff.

E. D. Broadhurst and Bynum, Hobgood & Alderman for defendants.

CLARK, C. J. The exception for the refusal of the nonsuit is based upon the ground that the summons is entitled "Joseph M. Wright v. James C. Davis, director general and agent of the Chesapeake and Ohio Railroad Company, and the Pullman Company."

The summons was returned as having been served on "O. F. York, agent of the Pullman Company" which was at that time, as the complaint alleges, being operated by the U. S. Government together with the C. & O. R. R. Co., through James C. Davis, agent, appointed by the

government under the "Transportation Act," ratified 28 February, 1920, which authorized the President to appoint an agent in substitution for John Barton Payne, then director general. James C. Davis filed an answer styling himself "Director general and agent" and verification of the answer was made by O. C. Cox, describing himself in the verification as "Attorney for James C. Davis, director general and agent." At the trial term the record shows that the case entitled "Jos. M. Wright v. James C. Davis, director general and agent of the C. & O. R. R. Co., and agent of the Pullman Company" was tried and the usual issues in an action for damages, sustained by negligence of the defendant, were submitted. The record further shows as follows: "The defendant, James C. Davis, director general and agent of the Pullman Company moves to set aside the verdict for errors and as being against the weight of the evidence; motion overruled and the defendant excepted." Judgment was signed as set out in the record and the defendant appealed to the Supreme Court. The summons, the complaint, the answer, the issues and the judgment are all styled "James C. Davis, director general and agent" and he defended and appealed in that name.

The defendant lays stress in his brief here upon the contention that James C. Davis is not expressly called in the record *"Presidential* agent."

It is contended that he was sued as agent, not as the President's appointee under the act of Congress, but as the agent of the Pullman Company. It is not denied that he is the agent appointed by the President pursuant to the act of Congress. He was sued as such, and as such was in control of the operation of the C. & O. R. R., and the Pullman Co., answered, went to trial, through his counsel moved to set aside the verdict and appealed,—all under that designation. If there was any force in the exception that he now presents, he should have filed an answer setting up the grounds of such defense. He did not do so but appealed in the action generally.

It is true that prior to the trial on 27 December, 1921, the defendant, the Pullman Company, filed a motion to dismiss the action on the ground that at the time the Pullman Company was in possession of and under the complete control of and operated by the director general of railroads, and 1 March, 1922, upon the hearing of said motion, the court found as a fact that service had been made upon "O. F. York, agent of the Pullman Company, and that at the time of said service of summons he was ticket agent of the Pullman Company at Greensboro" and the judge held that such service was sufficient to bring James C. Davis, director general and agent into court in this action and overruled the motion to dismiss, and the defendant excepted.

No appeal lay, of course, from the refusal of the motion to dismiss, but the exception was noted in the record and comes up for a review

upon this appeal from the final judgment in the action. It is clear upon the evidence and the pleading that the suit was against James C. Davis, agent, appointed by the President, in charge generally as agent for the Government of the railroads and the Pullman Company. The service upon York of the Pullman Company was service upon James C. Davis, agent, under whose charge the said company was being operated. *Clements v. R. R.*, 179 N. C., 226; *Gilliam v. R. R.*, *ibid.*, 511, which held (p. 226): "Service upon the local agent was service upon the director general, and also upon the company as represented by him. *Hollowell v. R. R.*, 153 N. C., 19; *Grady v. R. R.*, 116 N. C., 952."

In this case James C. Davis was named in the summons as agent of the Chesapeake and Ohio Railroad Company and the Pullman Company. The defendant rested his motion to dismiss the action upon the ground that Davis was not named in the summons "as agent designated by the President." But as a matter of law of which the court takes judicial notice, and which is not excepted to in the evidence, the President was authorized to appoint an agent to take charge of the railroads and transportation companies as agent in succession to Walker D. Hines or John Barton Payne, former directors generals, and as such he appointed James C. Davis agent of the railroads and of the Pullman Company. The words "Director general" would not have strictly and accurately described him under the act and as a matter of fact, as well as of law, he was James C. Davis, agent, for as a matter of public record and history, John Barton Payne, who had been up to 1 March, 1920, director general of railroads when, in pursuance of the Transportation Act, ratified 28 February, 1920, the President being authorized to appoint an agent to discharge the same duties, James C. Davis was appointed and took charge and who having been served with the summons herein answered, issues were submitted and judgment rendered thereon.

At this term, in *Ashford v. Davis*, *ante*, 89 (opinion filed 7 March, 1923), the summons was served on the local agent of the railroad and Walker D. Hines, the director general of railroads, appeared and defended. That action had been begun before 1 March, 1920, and subsequently James C. Davis was substituted for the former director general, and the Court held that the motion to dismiss the action was properly denied, citing *Bagging Co. v. R. R.*, 184 N. C., 73.

In another case, *Dixon v. Davis*, 184 N. C., 207, the Court granted a new trial, but disregarded the fact that the defendant was styled director general instead of agent. There being no doubt about the identity of the person sued, and that he was sued as the representative of the railroads, the Court interposed no objection to any informality in the title of the defendant. The real defendant in those cases, as in this, was the corporation and the defendant James C. Davis, agent, as to whose identity there was no question, was merely the representative of the

corporations named in the summons, designated by the President as alleged in complaint, and not denied in the answer for the purposes of that action.

In *Bagging Co. v. R. R.,* 184 N. C., 73, where the action was instituted against the Government railroad administration, joining a corporation over whose lines it was alleged that the default occurred for which the action was brought, the Court dismissed the action as to the corporation, but continued it as to James C. Davis, who had been made agent in substitution of Walker D. Hines, director general, the Court holding that the action being on the docket, it would not abate because James C. Davis had not been made a party, but had been substituted as a defendant.

No error.

R. H. PLYLER v. SOUTHERN RAILWAY COMPANY.

(Filed 2 May, 1923.)

1. Negligence—Contributory Negligence.

Contributory negligence that will bar the right of recovery of the plaintiff is such omission of the observance of ordinary care required of him, under the circumstances, as concurring or coöperating with the negligence of the defendant becomes the proximate cause of the injury in suit.

2. Same—Evidence—Railroads—Public Crossings.

Where the contributory negligence of the plaintiff consists in his not listening or looking up and down the track before attempting to cross in his automobile, it is incompetent for him to testify, on this issue, that the failure of the engineer to ring the bell and blow the whistle, evidentiary upon the issue as to defendant's negligence, caused him to enter upon the crossing where the injury followed; the question of proximate cause to be determined by existing conditions and not by hypotheses or contingencies.

3. Same—Unlawful Acts—Evidence—Instructions.

Where the statute of another state, applicable to a negligence case tried in our own courts, provides that where a railroad train collides at a public crossing and injures the person or property of one attempting to cross, and the defendant railroad company's employees have neglected to give the required signals, which contributed to the injury, the corporation shall be held liable in damages unless it is shown that in addition to a mere want of ordinary care the person injured, etc., was at the time of the collision guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury: *Held,* the words "gross or wilful negligence" and "unlawful act" are not synonymous but alternative terms; and where there is no evidence of any "unlawful act," it is proper for the trial judge to so instruct the jury, and leave only to their consideration the question of gross or wilful negligence of the plaintiff, of which there was evidence.

4. Appeal and Error—Appellant—Burden of Proof.

The appellant must show in the Supreme Court prejudicial error to his rights in the Superior Court.

5. Railroads—Crossings—Negligence — Contributory Negligence — Look and Listen—Instructions.

Where there is evidence tending to show that the plaintiff had failed to use ordinary care before attempting to cross the defendant's railroad tracks at a public crossing, where the injury in suit arose, by neglecting to listen or look up and down the track before entering thereon, an instruction of the court does not make his right of recovery to depend upon this fact alone when elsewhere in the charge he has instructed the jury clearly and fully upon the principle of proximate cause, and such circumstances as would have excused him in not observing the care required of him under the circumstances.

6. Same—Obstructions.

The plaintiff's failure to look in both directions upon a railroad track before attempting to cross at a public crossing where he was injured in a collision with the defendant's train, will not be excused by the evidence that his view was obstructed by trees, etc., when it is shown from all of the evidence, that notwithstanding this obstruction he was afforded a clear and timely view of the track after passing the obstruction, and his failure to observe the care required of him under the circumstances was occasioned by his looking back over the way he had come.

7. Instructions—Negligence—Proximate Cause—Appeal and Error.

The charge of the court must be considered as a whole and will generally be sustained when it embodies the law applicable to the essential features of the case, and where he has repeatedly and unmistakably charged upon the principle of proximate cause, in a negligence case, his omission to have repeated the principle in a portion of the charge, will not be held for error as contradictory or misleading to the jury.

APPEAL by plaintiff from *Webb, J.*, at December Term, 1922, of GASTON.

Civil action to recover damages for injury to plaintiff's car caused by a collision with the defendant's train at a grade crossing in South Carolina. The highway intersects the roadbed at right angles, the highway running east and west and the railroad north and south. The train was going south and the plaintiff from east to west. The issues of negligence and contributory negligence were answered "Yes."

Judgment for defendant; appeal by plaintiff.

Mangum & Denny for the plaintiff.
O. F. Mason and George B. Mason for the defendant.

ADAMS, J. There was evidence for the plaintiff tending to show that the engineer did not give the usual signals as the train approached the crossing, and the plaintiff insisted that this evidence while primarily

relevant to the first issue should be considered in connection with the second issue as explanatory of the plaintiff's conduct in attempting to cross the track. In accordance with this contention the plaintiff offered to testify that he would not have gone on the crossing if the signals had been given. We think his Honor properly excluded the proposed evidence. Contributory negligence is such act or omission on the part of the plaintiff, amounting to a want of ordinary care, as concurring and coöperating with the negligence of the defendant becomes the proximate cause of the injury, and is to be determined by existing conditions and not by hypotheses or contingencies. However, the plaintiff testified substantially that if he had known the train was coming he would not have gone on the track—"if I could have seen through the hedge I would not have been on the track." And his Honor presented the plaintiff's contention as follows: "He contends and says that if the engineer, the defendant's agent, had discharged his duty, which it owed to the plaintiff, and rang its bell continuously for 500 yards, and had blown its whistle, that he would have heard it and stopped his automobile before he went on the track, and he says that being so, his automobile would not have been damaged; and he says the cause of this trouble was the negligence on the part of the defendant in failing to do what the law required, sound the whistle 500 yards, or ring the bell continuously for 500 yards before reaching the crossing, and plaintiff says defendant did not do that."

The plaintiff admits that the court gave the instructions to which his third exception relates omitting the clause "There is no evidence of any unlawful act on the part of the plaintiff." The Code of Laws of South Carolina, sec. 3230, provides that if a person is injured in his person or property by collision with the engine or cars of a railroad corporation at a crossing and it appears that the corporation neglected to give the required signals and that such neglect contributed to the injury the corporation shall be liable in damages . . . unless it is shown that, in addition to a mere want of ordinary care the person injured, or the person having charge of his person or property was at the time of the collision guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or wilful negligence or unlawful act contributed to the injury. In *Howard v. Payne,* 112 S. E., (S. C.), 437, it is held that the terms "gross or wilful negligence" and "unlawful act" are not synonymous, but alternative terms, and they were so construed by his Honor on the trial. There was evidence of gross negligence on the part of the plaintiff, and no contention that he was guilty of an unlawful act. This question was not in issue and it is difficult to see how the omission of all reference to it could have misled the jury. The appellant must show, not only that there was error in the respect com-

plained of, but that such error was prejudicial. *Penland v. Barnard,* 146 N. C., 379; *Hosiery Co. v. Cotton Mills,* 140 N. C., 452.

His Honor first gave the general instruction that it was the duty of the plaintiff before going upon the railroad to look up and down the track and to listen and if he failed to do so and was injured and such failure was the proximate cause of the injury he could not recover, and afterwards the following specific instructions were given: "If you find by the greater weight of the evidence that the plaintiff failed to look up and down the track, if he failed to look up and down, and failed to listen before he went on it, and in his failing to do so he drove on it and the car choked and the train struck it, then he would be guilty of gross negligence and you would answer the second issue 'Yes.' If you find that he failed to look and listen and find that if he had looked and listened up and down the track, he could have seen the train, or would have seen it, but in his failure to look and listen, he went on without doing that, and that was the proximate cause of the injury, then you will answer the second issue 'Yes.' "

The plaintiff impeaches the several instructions on the ground (1) that the court laid down as an arbitrary rule the duty to look up and down the railroad track and to listen before going upon the crossing, and (2) that the court omitted to tell the jury that the plaintiff's negligence must be the proximate cause of the injury.

In support of his exception to the first proposition the plaintiff cites *Chisholm v. Railroad,* 114 S. E. (S. C.), 500, in which the Supreme Court of South Carolina said: "The duty of the traveler arising under the foregoing rule is not an absolute one, but may be qualified by attendant circumstances. The view taken in this State is that it is ordinarily a question for the jury in the application of the standard of due care to say whether the attempt of the traveler to cross without looking and listening effectively was excusable or culpable; that is, whether or not it amounted to negligence or wilful misconduct." But the Court was careful to state conditions or circumstances by which the rule may be qualified: "The facts and conditions which may qualify the duty and excuse the failure to look and listen within the foregoing rules are usually: First, where looking and listening would not have availed to avert the injury; second, where the traveler enters upon the track under an express or implied assurance of safety, as where gates are open or signals are given by watchmen; third, the presence of some imminent danger or emergency, not brought about by the traveler's own negligence; fourth, the presence and influence of unusual or extraordinary conditions, not created or controlled by the traveler himself, and especially where such conditions are brought about by the railway company, which are sufficient to distract and divert the attention of a man

of ordinary prudence and self-possession from the duty of looking and listening effectively for an approaching train." And in defining the duty of a traveler on approaching a grade crossing the Court was equally explicit: "On reaching a railroad crossing and before attempting to go upon the track, a traveler must use his senses of sight and hearing to the best of his ability under the existing and surrounding circumstances; he must look and listen in both directions for approaching trains, if not prevented from so doing by the fault of the railroad company, and to the extent the matter is under his control must look and listen at a place and in a manner that will make the use of his senses effective."

In accord with *Chisholm's case* are several decisions of this Court, in which it is held that a traveler must look and listen in both directions for approaching trains if not prevented from doing so by the fault of the railroad company or other circumstances clearing him from blame. *Perry v. R. R.*, 180 N. C., 290; *Johnson v. R. R.*, 163 N. C., 431; *Wolfe v. R. R.*, 154 N. C., 569; *Coleman v. R. R.*, 153 N. C., 322; *Strickland v. R. R.*, 150 N. C., 7; *Duffy v. R. R.*, 144 N. C., 26; *Mesic v. R. R.*, 120 N. C., 490.

The plaintiff resists the application of the instruction complained of on the ground that his view was obstructed by the cane patch and the hedge; but he testified that the distance between the cane patch and the railroad was 138 feet and the distance between the crossing and the hedge row 600 feet, that the car was moving slowly, and that when within 25 or 30 feet of the crossing he "turned his head and turned back looking after his car." In one direction a train could have been seen when a mile away and in the other, when 600 feet away; but instead of looking and listening the plaintiff deliberately turned his eyes from the railroad and recklessly went forward and his car stopped upon the track in front of the oncoming train. His Honor's instruction, when considered with reference to the plaintiff's testimony is a clear and practical application of the principle underlying the uniform decisions of the Court on the particular question presented for consideration.

In our opinion the second objection also is untenable. The instructions, as we understand them, are not contradictory; they would have been if in one paragraph his Honor had said that the plaintiff's negligence must have been the proximate cause of the injury and in another paragraph that such negligence need not have been the proximate cause. But the judge properly instructed the jury at least four times on the question of proximate cause, and in our judgment it would be hypercritical to hold that an inadvertent omission of this feature from a single clause is fatal. The charges it has often been decided, must be considered as a whole, and if when so considered it embodies the law as

applicable to the essential features of the question it will generally be sustained. *Aman v. Lumber Co.*, 160 N. C., 369; *Hodges v. Wilson*, 165 N. C., 323; *Bain v. Lamb*, 167 N. C., 304; *Ledford v. Lumber Co.*, 183 N. C., 614.

From an examination of the record, the exceptions, and the briefs, we are satisfied that the case has been properly tried, and that there is

No error.

J. LUTHER SNYDER, ET AL. v. H. B. HEATH.

(Filed 2 May, 1923.)

Deeds and Conveyances—Development Companies—Plats—Restrictions—Fee Simple—Title.

A land development company purchased a large acreage of lands in or adjoining a city, had the same platted into lots and sold and conveyed them to various purchasers, in each deed reserving to itself all rights, privileges and easements upon the said property not expressly granted, without uniform scheme of development by which any of the grantees could insist upon performance of any restrictions contained in the deed to the other purchasers, the same not being for their benefit or in which they could acquire any right. The defendant entered into a valid and binding contract with the plaintiff to purchase the absolute fee-simple title to several of these lots that the plaintiff had bought from the development company, to which the company executed its quit-claim deed, and the defendant set up the lack of plaintiff's title on the ground that there were restrictions in plaintiff's deed from the development company that only residences could be built thereon, etc. The judgment sustaining the validity of the plaintiff's fee-simple title was affirmed on appeal. *Homes Co. v. Falls Co.*, 184 N. C., 426.

APPEAL by defendant from *Long, J.*, at April Term, 1923, of MECKLENBURG.

Controversy without action, submitted on an agreed statement of facts.

On 3 January, 1923, the plaintiffs and the defendant entered into a valid written contract whereby the plaintiffs agreed to sell and convey to the defendant, and the defendant agreed to purchase from plaintiffs, a good and indefeasible fee-simple title to four certain lots of land situate in the City of Charlotte, and being shown and designated as Lots. Nos. 7, 8, 9 and 10, in block No. 2, on the map of the property of the Highland Park Company, which is recorded in the office of the register of deeds for said county, each of the said lots fronting 72 1-2 feet on the west side of Hawthorn Lane, with a depth of 193 feet. The said lots of land were to be conveyed free and clear of all liens and

encumbrances and free and clear from all conditions and restrictions limiting or affecting the use and occupancy thereof, except such restrictions and conditions as may have been placed on the same prohibiting the ownership and occupancy thereof by persons of the negro race.

The plaintiffs tendered to defendant a deed in due form for the said lots of land. The defendant refused to accept the deed and to comply with said contract, for that the Highland Park Company, the original owner of the whole tract of land, of which the aforesaid lots are a part, conveyed Lot No. 9, in Block 2, by deed dated 17 September, 1902, with the following provisions incorporated therein:

"And in consideration of the premises it is expressly covenanted and agreed between the parties to this deed and made a condition thereof that the party of the second part, his heirs and assigns, shall use the lots hereby conveyed for residence lots only, and that any residence building that may be erected on said lots shall not cost less than $2,000; that no building shall be erected thereon within 25 feet of the street or avenue upon which the building fronts; and further, that no part of the property hereby conveyed shall ever be owned or occupied as a tenant by any colored person."

It is the contention of the defendant that on account of these provisions in the deed of the Highland Park Company, plaintiffs cannot convey to him a good and indefeasible fee-simple title to said Lot No. 9 in Block No. 2. The deeds for the other three lots, covered by the contract, contained no conditions or restrictions whatever, and there is no question raised as to the title thereto.

About the year 1893 the Highland Park Company, a corporation, acquired a large tract of land, of which the said lots of land above described are a part, which was then outside of the city of Charlotte, but is now located in the eastern section of said city; that said company caused to be made a map of a part of said property, showing a division into the lots and blocks, streets and alley-ways, a copy of the map being of record in the register's office in said county. Another slightly different map of the same area was caused to be made and recorded by the said company. A concise history of the conveyances of the said Highland Park Company of the property shown on said maps is as follows:

(a) 48 lots and a 20-acre tract were conveyed prior to the *locus in quo* without restrictions;

(b) 29 lots were conveyed after the *locus in quo* without restrictions;

(c) 38 lots, represented by 23 deeds, were conveyed, subject to restrictions by four deeds before and nineteen deeds after the *locus in quo.*

The 20-acre tract referred to above was conveyed to Elizabeth College and was the first conveyance by the said Real Estate Company. The four deeds which were made prior to the deed for the *locus in quo,* con-

tained provisions exactly similar to those above set out in the deed from the Highland Park Co.

The plaintiffs have secured a deed in due form from the trustees, in dissolution of the Highland Park Company, who comprise all of the stockholders of the said company, releasing the *locus in quo* from all of the conditions and restrictions relative to its use and occupancy, and under which it was originally conveyed, in so far as the said company is concerned.

The Highland Park Company made no other conveyances, by reference to the two maps aforesaid, other than those referred to in the statement of facts agreed, and had no other maps showing said Block No. 2, other than the two maps above referred to.

It is agreed in the statement of facts that the plaintiffs are seized of a good and indefeasible fee-simple title to the lots of land first above mentioned, except in so far as such title is affected or limited by the conditions and restrictions purporting to limit the use and occupancy of the said lot, as set forth in the deed for Lot No. 9, Block 2, as aforesaid. In every one of the deeds of the Highland Park Company in which any conditions and limitations relative to the use and occupancy of the lands conveyed were inserted, with exception of two of such deeds, there occurred the following provision: "The party of the first part expressly reserves to itself all rights, privileges and easements in and upon its said property not expressly granted to the said party of the second part."

None of said deeds contained any clause of forfeiture in event of breach of said conditions.

All lots in Block 2, except Lot No. 9, the *locus in quo*, were conveyed without restrictions. The property directly across Hawthorn Lane, the 20-acre tract referred to, was conveyed without restrictions. All of the property in the fractional block, across Travis Avenue and adjacent to Block 2, was conveyed without restrictions. The greater portion of Block No. 1, across Elizabeth Avenue, was conveyed without restrictions. Lots Nos. 2 and 3 in Block 4, on the opposite side of 5th Street from the *locus in quo*, were conveyed without restrictions; and a number of other lots, as shown upon said maps, were conveyed without restrictions. A commercial green-house is now conducted upon a part of the Elizabeth College tract.

The property in Block No. 2 has become valuable on account of the fact that it is not subject to conditions and restrictions, and one-half of said block has been sold at the price of $100 per front foot, on account of the fact that the same may be used for business purposes. The purchasers thereof are contemplating the improvement of the same for business purposes.

Upon the controlling facts, as above stated, judgment was entered in the Superior Court in favor of the plaintiffs, the reasons assigned for the conclusion reached by his Honor being as follows:

"It appearing that no uniform scheme of development of the property of said company shown upon the maps referred to in the agreed statement of facts had been adopted and put in force to such an extent as to give rights to the owners of lots shown upon said plan to insist upon performance of the conditions contained in said deed, and that the conditions and restrictions inserted in said deed aforesaid as set forth in said agreed statement of facts were not inserted for the benefit of other remaining lands of grantor shown upon such maps, and that the right to the enforcement of such restrictions and conditions did not pass to subsequent grantees of lands shown upon said maps, it appearing that in every deed made by said development company conveying lands shown upon said maps in which such conditions and restrictions were inserted, except two, the said Highland Park Company reserved unto itself all rights in its lands not specifically granted by the terms of said deeds to the grantees therein; and it appearing further that in the deed conveying Lot No. 9 in Block No. 2 as aforesaid there was no clause providing for a forfeiture or reverter of the title to said lot in event of a breach of or failure to perform the conditions and restrictions as set forth in said deed; and it appearing further that by deed in proper form the Highland Park Company, the only party who would have the right to insist upon the carrying out, performance and observance of the conditions and restrictions contained in its said deed conveying said Lot No. 9 in Block No. 2, as aforesaid, has released plaintiffs and the said lot from the performance and observance of said restrictions and conditions and has agreed that the title to the said lot shall be released and freed from the said conditions and restrictions and that it may be used in any way and for any purpose which plaintiffs may desire; and the court being of opinion and finding as a matter of law that upon the facts agreed, plaintiffs have and can convey to defendant a good and indefeasible fee-simple title to the said lots of land referred to in the statement of facts, to wit: Lots Nos. 7, 8, 9, and 10 in Block No. 2, as shown on map recorded in book 127, page 47 in said register's office, free and clear of any conditions and restrictions affecting or limiting the use and occupancy of the said lots."

From the judgment rendered, defendant appealed, assigning errors.

Parker, Stewart, McRae & Bobbitt for plaintiffs.
Clarkson, Taliaferro & Clarkson for defendant.

STACY, J., after stating the case: For the reasons so clearly stated by his Honor, Long, J., who heard the case below, we think the judgment

must be upheld. See *Homes Co. v. Falls*, 184 N. C., 426; *Stevenson v. Spivey*, 21 A. L. R. (Va.), 1276, and annotation, where the questions involved are exhaustively treated.

Affirmed.

JOHN HALLIBURTON, ET AL. v. JOE PHIFER.

(Filed 2 May, 1923.)

1. Wills—Devise—Intent—Income—Heirs—Estate.

A will of the mother bequeathing two-thirds of the income from her estate to the youngest of her two sons until he is twenty-one years of age, and until he should reach the age of twenty-five, an equal division of this income between the two sons, and thereafter "it" was to be divided and equally *given* to each, is interpreted as changing the disposition of the whole estate after the youngest son has reached the age of twenty-five, at which time the corpus of the estate and not its income is to be given, or handed over to the two sons in equal parts, and *held* the provision that in the event "they die . . . leaving heirs, it shall go to the heirs of same," refers to the death of one or both of the sons before the time designated for the final disposition of the estate itself.

2. Wills—Devise—Rents—Perpetuities—Estates—Lands.

A devise in perpetuity of the rents and profits, or the income of land, passes the land itself in the absence of anything to indicate the testator's contrary intent.

APPEAL by defendant from *Long, J.*, at April Term, 1923, of MECKLENBURG.

Controversy without action, submitted on an agreed statement of facts. The case involves the construction of a will.

From a judgment in favor of plaintiffs, the defendant appealed, assigning errors.

Julia M. Alexander for plaintiffs.
Clarkson, Taliaferro & Clarkson for defendant.

STACY, J. The defendant entered into a valid contract to purchase from plaintiffs a lot of land in the City of Charlotte; but, on tender of deed in due form purporting to convey same in fee simple, defendant refused to accept the deed and pay the purchase price, alleging and contending that plaintiffs were not seized in fee of said premises and could not convey an indefeasible fee-simple title to the *locus in quo*.

The agreed facts with reference to the title, as appear from the record, are as follows:

1. Plaintiffs are the only heirs at law and sole devisees of Mrs. Lucy

A. Halliburton, their widowed mother, who died in December, 1919, seized of a good and indefeasible fee-simple title to the land in question and leaving a will in holographic form, which was duly admitted to probate and which reads as follows:

"This is to certify that I, Lucy Halliburton, will, that Alexander Halliburton, the younger son of same, shall have two-thirds of my income until he, Alexander Halliburton, is twenty-one years of age. Then the income shall be divided in one-half, each getting equal part, until Alexander Halliburton is twenty-five years old, after that time it shall be divided in one-half, and given one-half to each of my two sons, John Halliburton, and Alexander Halliburton, or, if they die leaving heirs, it shall go to the heirs of same.

"This is my desire and will.

"Signed by their mother, Lucy Alexander Halliburton.

"Aug. 23, 1911."

2. John Halliburton is thirty-two years of age and Alexander Halliburton attained the age of twenty-five years during the month of June, 1922.

3. It is agreed that if plaintiffs, as the sole devisees and heirs at law of the testatrix, acquired an indefeasible fee-simple title to the said lot of land they now have and can convey such title.

His Honor, being of the opinion that the title offered was sufficient to convey a fee-simple estate, rendered judgment in favor of the plaintiffs, and defendant appealed.

The objection urged by the defendant is that only the income and not the corpus of the property in question is devised to the plaintiffs under their mother's will. While, as a matter of technical syntax, the word "it" should probably be construed as taking the place of the antecedent noun "income," when the testatrix says "after that time it shall be divided in one-half," etc., yet we think it is manifest that she was here speaking of the corpus of her property. Her first desire seems to have been to give her younger son two-thirds of the income from her estate during his minority. Her next desire was to hold her estate intact until Alexander, the younger son, reached the age of twenty-five. She provided that when he had reached the age of twenty-one "the income shall be divided in one-half, each getting equal part, until Alexander is twenty-five years old, after that time it shall be divided in one-half, and given one-half to each of my two sons." If the word "it" be held to mean income, then the last part of this quotation would be but a bare repetition of the first. The testatrix undoubtedly intended to provide for a different disposition of her estate after Alexander reached the age of twenty-five than for the period between his ages of 21 and 25. To accomplish this

end, the disposition necessarily must consist of something more than an equal division of the income between the two sons. The more rational construction and the only one which will give meaning to the whole will and every part thereof would seem to be that, upon Alexander's arriving at the age of twenty-five, "it"—the property itself and not the mere income—is to be divided into halves and given, that is, turned over, to the two sons equally. The use of the word "given" would seem to be significant when considered in connection with the prior provisions. Until he arrived at the age of twenty-one, Alexander was to "have" two-thirds of the income; then the income was to be divided equally, each "getting equal part" until Alexander reached the age of twenty-five; but after that time "it" was to be divided and given equally to each. The word "given" in this connection would seem to connote a final surrender and disposition of the whole estate—a giving without further restriction. The provision that, in the event "they die leaving heirs, it shall go to the heirs of same," has reference, we think, to the death of one or both of the first takers before the arrival of the time when the property was to be "given"; that is, before the arrival of Alexander at the age of twenty-five.

Furthermore, it has been held in a number of cases that a devise in perpetuity of the rents and profits, or of the income, of land passes the land itself in the absence of anything to indicate a contrary intention. *Reed v. Reed,* 9 Mass., 373; *Manners v. Manners,* 20 N. J. L., 142; *Mayes v. Karn,* 115 Ky., 264; 40 Cyc., 1536. See, also, *Kornegay v. Morris,* 122 N. C., 199.

The judgment of the Superior Court will be upheld.

Affirmed.

N. M. BROWN v. TOWN OF HILLSBORO.

(Filed 11 April, 1923.)

1. Appeal and Error—Objections and Exceptions—Record.

Where exceptions set out in appellant's summary thereof do not conform to the exceptions shown in the statement of the case on appeal settled by the judge, the latter will prevail.

2. Pleadings—Courts—Discretion.

The trial judge has the discretionary power conferred on him by statute to allow the defendant to file an answer to the amended complaint during the term, and his action will not be reviewed on appeal when an abuse of this discretion has not been shown. C. S., 536.

3. Evidence—Handwriting—Witnesses—Nonexperts.

One who is acquainted with the handwriting of the person supposed to have written the instrument in question from often having seen him

write, or from having acquired competent knowledge of his handwriting in some other approved manner, is competent, though a nonexpert in handwriting, to testify as to its genuineness or falsity.

4. Evidence — Municipal Corporations — Cities and Towns—Entries—Records.

The full entry of the minutes of the board of town commissioners relating to an election called to determine the question of taxation and issuing bonds for improvements, etc., is required to be introduced upon the trial, in order that the court and jury may understand what had been done at the meeting, in passing upon the validity of the corporate acts in question, and the sufficiency of the evidence. *Bailey v. Hassell*, 184 N. C., 450, cited and approved.

5. Appeal and Error—Objections and Exceptions—Questions and Answers—Evidence.

Appellant must except to a question asked a witness upon the trial at the time the question was asked, or he will be deemed to have waived his right to have his exception to the admission of the evidence considered on appeal.

6. Evidence—Hearsay—Irrelevant.

Evidence on the trial of an action is properly excluded by the court when it is hearsay or has no relation to the issue.

7. Evidence — Municipal Corporations — Cities and Towns—Local Improvements—Petition.

Where a petition for local improvements has been made to the town commissioners, the question as to whether a certain person has signed is best evidenced by the petition itself; and where it appears to have been signed for a mercantile company by its business manager, it is competent for the witness to show this authority to sign for the company, or the subsequent ratification of his act.

8. Evidence—Irrelevant—Answers to Questions—Motions to Strike Out—Courts—Discretion.

Irrelevant testimony, unresponsive to a question asked by a party of his witness, should be asked to be stricken out by the party at the time, if objected to; and where he has acquiesced by his delay, the matter is within the discretionary power of the trial judge.

9. Partnership—Municipal Corporations—Cities and Towns—Petition for Local Improvements—Signatures—Scope of Partnership Powers.

A partner, acting within the scope of the partnership, may sign his firm's name to a petition to the town commissioners for local improvements to be made in the street upon which the firm's lands abut.

10. Municipal Corporations—Cities and Towns—Local Improvements—Petition—Bonds.

Held, it is sufficient under the facts of this case that a petition signed by the owners of land abutting upon a street sought to be improved be presented to the proper town authorities, at any time before the issuance of the bonds contemplated.

11. Trials—Prejudice—Courts—Duty of Judge.

It is proper and commendable that the judge presiding at the trial, acting with fairness to both parties, prevent prejudice from entering into the jury box on the trial of an action, and *held*, in this case, it was proper for him to instruct the jury that they must find the facts from the evidence, and not from what the court or counsel may have said.

12. Municipal Corporations—Taxation—Bonds—Value of Property—Evidence—Tax Lists.

Where the value of the property within a town is relevant to the inquiry as to its constitutional authority to issue municipal bonds, such value as last fixed by the constituted authorities is that required by the statute, and that of the preceding year is irrelevant.

13. Evidence — Municipal Corporations — Cities and Towns — Property Valuation—Statutes.

Exception to the submission of appellant's issues that do not arise from the pleadings is untenable on appeal; and *held*, those submitted in this case were clearly sufficient and comprehensive to present every material question in controversy, and not subject to valid exception.

14. Appeal and Error—Objections and Exceptions—Record—Appellant's Summary of Exceptions.

Exceptions to the instructions of the court should be specific and stated separately in articles numbered; and it is preferable that no exception contain more than one proposition; and additional exceptions to those appearing of record and afterwards inserted in the appellant's summary of exceptions will not be considered on appeal.

15. Municipal Corporations—Cities and Towns—Statutes—Implied Authority—"Borrow Money"—Bonds—Notes.

The borrowing of money by an incorporated city or town for street paving or improvements is for a necessary expense, and does not fall within the provisions of Article VII, section 7, of the State Constitution requiring that in order for the municipality to pledge its faith or lend its credit, the proposition must have the approval of a majority of the qualified voters.

16. Municipal Corporations—Cities and Towns—Local Improvements—Remedy of Owner Assessed—Statutes.

The owner of land abutting on a street the municipality proposes to improve has his remedy in objecting to the local assessment on his property because of the insufficiency of the petition, C. S., 2714, and he may not enjoin the issuance of bonds for this necessary expense on that ground when he has failed to pursue his statutory remedy.

17. Municipal Corporations—Cities and Towns—Local Improvements—Bonds—Necessary Expenses—Apportionment of Funds—Statutes.

Where a town has issued bonds for general street improvements under legislative authority, and includes the amount required for local improvements by assessment of owners of lands abutting a particular street improved, it may charge off from the proceeds of the sale of the bonds the estimated amount to be realized by the special assessments under the provisions of a recent statute.

18. Municipal Corporations—Cities and Towns—Indebtedness—Statutes—Legislative Control.

Municipalities, in incurring obligations for the improvements of their streets, etc., are largely subject to legislative control, and must observe the legislative requirements under which they act.

19. Statutes—Curative Statutes—Vested Rights.

When the Legislature has authority to enact a statute, but it is invalid for irregularities in its passage, the defects may be cured and the act validated by proper legislation when there is no question of impairing vested rights.

20. Municipal Corporations — Cities and Towns — Taxation — Property Value—Limitation—Constitutional Law—Instructions.

Held, under the evidence in this suit to enjoin a town from issuing its bonds for street improvements, necessaries under the provisions of Article VII, section 7, State Constitution, the court properly charged the jury as to the constitutional limitation of 8 per cent upon property valuation, and that the jury should only find the facts in the case under the instructions of law from the judge, and not concern themselves with the discretionary matters left by law to the municipal authorities to determine.

21. New Trials—Motions—Newly Discovered Evidence—Burden of Proof.

The applicant for a new trial for newly discovered evidence has the burden of rebutting the presumption that the verdict is correct, and of showing that there has not been a lack of due diligence on his part; and as a prerequisite to the granting of his motion it must appear by affidavit that the witness will give the newly discovered evidence; that it is probably true; that it is competent and relevant; that due diligence has been used by him; that the testimony is not merely cumulative; that it does not tend only to contradict a former witness or to impeach or discredit him; and that on another trial a different result will probably be reached and the right prevail.

APPEAL by plaintiff from *Connor, J.*, at December Term, 1922, of ORANGE.

C. D. Turner for plaintiff.
A. H. Graham and Gattis & Gattis for defendant.

WALKER, J. In view of the discrepancies between the alleged statement of facts in appellant's brief and the summary of exceptions, and the exceptions in the statement of case on appeal, as settled by the judge, we deem it proper to make the following preliminary explanation:

The governing body of the town of Hillsboro, on 28 August, 1922, passed the bond ordinance in question, which was to be submitted to the qualified voters of the town at an election to be held 10 October, 1922. Before said election was held, plaintiff brought this action to restrain the holding of said election. At the hearing of the matter at chambers,

plaintiff abandoned his request for an order restraining the holding of the election, and was granted permission to file an amended complaint, and the election, for which a new registration of qualified voters was had, totalling 399 names, was duly held on 10 October, and at this election 290 votes were cast in favor of said bond ordinance and 7 votes were cast against it. Plaintiff filed an amended complaint, seeking to prevent the proposed issue of bonds by the town, and to test the validity of a contemplated assessment for local improvements. No bonds have been issued nor has any assessment been made. After the election, on 28 November, 1922, the governing body of the town considered certain petitions filed by property owners asking for local improvements amounting approximately to $15,000, as shown by the report of the engineer, in accordance with Laws 1915, ch. 56, and amendments thereto. After careful consideration of these petitions, the board authorized the issuance of bonds in the sum of $60,000, which amount was to cover the street improvements, contemplated by the town, and the local improvements petitioned for.

Inasmuch as the exceptions contained in appellant's summary of exceptions do not conform to the exceptions shown in the statement of the case settled by the judge, we will have to consider only the exceptions as found in the statement of the case on appeal, and we will take up the exceptions in the order appearing in the record.

Exception number one: This matter is in the discretion of the trial court. The motion was based upon defendant's failure to file an answer to the amended complaint, and to the leave granted by the court to file an answer during the term. A holding based on Revisal of 1905, sec. 515, now C. S., 536, reads: "The exercise of the discretion of the trial judge in permitting an extension of time to file pleadings is not reviewable on appeal." *Church v. Church*, 158 N. C., 564, headnote 2, there being no gross abuse of the discretion in this instance.

Exception number two: The genuineness or falsity of disputed handwriting may be proven by testimony of a witness, not an expert, who is acquainted with the handwriting of the person supposed to have written it, either because he had often seen him write, or who had acquired competent knowledge of his handwriting in some other approved manner. Abbott's Proof of Facts (4 ed.), p. 579, par. 4, and cases cited.

Exception number three: The minutes of the board having been introduced in evidence by plaintiff, the court and jury were entitled to hear the full entry in regard to the action taken by the board in the matter. One reason is because without knowledge of the entry the court or jury could not understand what was done. The subject of the validity of corporate acts, and the evidence tending to show it, was considered in *Bailey v. Hassell,* 184 N. C., 450.

Exception number four: An objection to the reception of evidence is waived if not taken in apt time. *Johnson v. Allen,* 100 N. C., 135; 26 R. C. L., pp. 1045-46. It is the general rule that an objection to a question asked a witness must be interposed when the question is asked and before the answer, or the right to have the testimony excluded is waived. *Dobson v. R. R.,* 132 N. C., 900. Even if objection had been made in apt time, this evidence was competent for the reasons set forth above under exception number three.

Exception number five: The evidence proposed to be introduced was incompetent because it was hearsay, and had no bearing on the issue. Lockhart on Evidence, ch. X, p. 138; *King v. Bynum,* 137 N. C., 491. We have cited authorities for this proposition, but it would seem to be unnecessary, as the principle is elementary.

Exception number six: The question asked was incompetent because the petition itself shows that Mrs. Waller had not signed it, and the petition was the best evidence.

Exceptions numbers seven and eight: The petition being signed "Merchants Supply Company, by J. H. Freeland, Business Manager," it was competent for the witness, as president of the corporation, to explain the authority for the signature, which she did by testifying that she instructed him to sign it for the corporation, showing that she not only authorized it, but ratified the action of her agent, who was her brother, in signing the petition.

Exceptions numbers nine and ten: The evidence here objected to was elicited by plaintiff from his own witness, in response to his own questions, and there was no objection by plaintiff until the entire testimony, consisting of several sentences, was in. Plaintiff should have moved to strike out the testimony of the witness, which he failed to do. It was in the discretion of the court whether it would strike out the testimony, where objection to it was apparently acquiesced in, and the objection came too late.

Furthermore, the evidence of the witness disclosed that he was, and had been for many years, acting as agent for the heirs of James Webb, Jr., Cox and Browne Webb, and of his mother, Mrs. J. C. Webb; that he transacted all their business with reference to the property in question, and that his action in so doing had been endorsed, and ratified, and his agency recognized by them; and, furthermore, that it had been confirmed by acquiescence, and his signature to the petitions in question, not having been objected to by them, but seemingly recognized and ratified, neither plaintiff nor any other person should be heard to question them.

Exception number eleven: The witness, as a member of the firm of H. W. and J. C. Webb, a partnership, had a right to testify that he signed the petition for the firm, in explanation of this act of signing the

petition. It appears from the testimony of the witness that this partner signs practically all papers for the firm, in the course of the partnership business, and the other member of the firm not questioning his right to sign it in this case, though called upon to do so, no one else can question it. According to the evidence of the witness, he owned no property as an individual, but only as a member of the partnership.

Exception number twelve: The evidence sought to be admitted was incompetent, irrelevant, and immaterial, and the error, if any, was cured later by the testimony of the witness Arrasmith that he was not present. Appellant makes no contention that the chairman of the board of county commissioners signed the petition before 28 August, 1922, as it was not necessary for the petition of property owners, requesting the making of local improvements, to be filed at the time of the passage of the ordinance, but it is sufficient for the petitions to be filed at any time prior to the issuance of the bonds. This is clearly set forth in Laws 1921, Extra Session, ch. 106, sec. 2941.

Exception number thirteen: A controversy having arisen between counsel over the health of the town treasurer, the remarks of the court were addressed to statements by counsel on that point. It was manifestly proper for the court to tell the jury that they must find the facts from the evidence and not from what counsel or the court had said. *S. v. Foster*, 172 N. C., at p. 963. Considering only what the record discloses, this controversy, so far as we can judge of it, hardly reached the proportions of even a "tempest in a teapot," and though there is not a full statement of it, and some things appear in the briefs which are not clearly stated in the record, we cannot declare the remark of the judge to be error, for it impresses us as one deserving our commendation. A judge is not a mere moderator or a mere figurehead, but is an essential and important part of the court, if not the most important, and should take the lead and direct the course of proceedings, where necessary to orderly procedure in the court. The action of the judge worked no harm to the plaintiff, and it must be said that he does not occupy (figuratively speaking) a position like unto that of a "bump on a log," but is an active agency and expected to assume and retain a commanding position, to keep all things well in hand, as the learned judge very properly and promptly did in this case, thereby preventing prejudice to either of the parties, and this is what we not only approve, but commend.

Exceptions numbers fourteen and fifteen: The tax books for the year 1921 could throw no light upon the amount of taxable property assessed for taxation for the year 1922, which latter is the valuation required by Laws 1921, Extra Session, ch. 106, sec. 2943, subsec. 1 (5) (d), which provides that "The assessed valuation of property, as last fixed for municipal taxation," shall govern, which in this case was the assessed valuation as fixed 1 May, 1922.

Exception number sixteen: This, if error, is harmless, as all computations were based upon the assessed valuation of taxable property as of 28 August, 1922.

Exception number sixteen and a half: We refer to the discussion under exception number one of this opinion, without repetition, as it applies to this exception.

Exception number seventeen: The issues tendered by plaintiff are not such as naturally arose upon the pleadings. C. S., 584; *Potato Co. v. Jeanette,* 174 N. C., par. 4, p. 240. Further, the statement of case shows no exception was taken to the issues submitted, and they were clearly sufficient and comprehensive to present every material question in controversy. *Ratliff v. Ratliff,* 131 N. C., 425; *Warehouse Co. v. Ozment,* 132 N. C., 839.

Exceptions numbers eighteen and nineteen: The statement of the case shows that plaintiff noted two general exceptions to the charge of the court. In his summary of exceptions, he has inserted other exceptions and points out certain alleged errors, but this comes too late, and is not a compliance with the rule. Exceptions to the charge must be specific and not too general. *S. v. Johnson,* 161 N. C., 264; *Jackson v. Williams,* 152 N. C., 203. Exceptions must be stated separately, in articles numbered, and it is better that no exception should contain more than one proposition. *Gwaltney v. Assurance Society,* 132 N. C., 925.

In appellant's brief reference is made to the case of *Tarboro v. Forbes, ante,* 59. That case is distinguished from the present one in that the *Tarboro case, supra,* was brought to enforce an assessment made on property for local improvements. This case is to test the validity of a bond ordinance. In the *Tarboro case, supra,* the submitted controversy and agreed facts showed that the town owned as a common the entire length of one side of the improvement district, which constituted about one-half of the front foot line, and that the town had not signed the petition, and as all the owners on the other side of the street had not signed the petition, it was manifest from the record, on its face, that the requisite number of owners and of lineal frontage had not signed, but here the record shows that a majority of the owners, having the larger part of the lineal feet on the front line, have signed, and this fact was so found by the jury.

A municipal corporation has authority to issue bonds for necessary expenses without the sanction of an election. Nevertheless, in this case an election was held, according to law, as now appears, and the bond ordinance was ratified by a vote of 297 to 7 out of a registered vote of 399. However, it is provided that the net debt of the municipality must not exceed 8 per cent of the taxable property therein.

This action is brought to challenge the right of the municipality to issue bonds for necessary expenses, and, in the trial, the validity and

sufficiency of the petitions for local improvements were attacked. If the plaintiff desires to attack the assessments when levied against his property, the statute gives him a remedy. C. S., 2714. Furthermore, it is immaterial in this action whether the petitioners are sufficient or not. The municipality may enact an ordinance authorizing the issuance of bonds for which local improvements are secured, provided the bonds are not issued until a majority of owners representing a majority of lineal front feet of property have signed the petitions. Laws 1921, Extra Session, ch. 106, sec. 2941.

If the petitions did not have a sufficient number of signatures, the town could issue bonds for necessary expenses, especially when sanctioned by popular vote, unless the issue should be in excess of the prescribed limitation. The statute of 1921 (Extra Session), ch. 106, sec. 2943 b (4), permits a municipality to charge off from its gross debt, among other things, amounts to be levied as special assessments for local improvements. Therefore, if at any time before the bonds are issued a petition for local improvements containing a sufficient number of authorized signatures to bind the property owners in the improvement district be filed and certified, the town may charge off the estimated amount to be realized by said special assessments, as provided by said statute, and in this case when this shall have been done, according to all the evidence, the net debt will be within the 8 per cent limitation.

Consequently, it would appear that a determination of the validity of the bond issue, or of the assessment, cannot be had until the town proceeds to issue its bonds. Then the plaintiff may bring his action to test the validity of the bond issue or of the assessment, as he sees fit. Plaintiff's action is now premature.

Appellee calls the attention of the Court to House Bill No. 347, Senate Bill No. 332, entitled "An act to ratify bonds of the town of Hillsboro," enacted by the Legislature of 1923, and ratified 12 February, 1923, a certified copy of which act has been filed in this action with the clerk of the court. *Kinston v. Trust Co.*, 169 N. C., 207; *Reid v. R. R.*, 162 N. C., 355-358; *Supervisors v. Brown*, 112 U. S., 261-271.

The *Kinston case, supra*, decided:

"1. A legislative authorization to a municipality to issue bonds for paving and generally improving its streets; to enlarge and extend its waterworks system; to enlarge and better equip its electric light plant; to install an electric fire-alarm system, and to erect municipal buildings, is for necessary expenses, and not subject to the restrictions of our Constitution, Art. VII, sec. 7, requiring that the question of the issuance of the bonds be submitted to the vote of the people.

"2. Municipalities are very largely subject to legislative control as to the issuance of bonds and other matters governmental in character, and

they must observe the statutory requirements, charter or otherwise, under which they act, it remaining in the power of the Legislature to remove by subsequent legislation irregularities by reason of the violation or nonobservance of requirements upon the municipality made in a previous act, when no vested rights have supervened and no mandate of the Constitution has thereby been violated. *Jones v. Comrs.*, 137 N. C., 579.

"3. Where a bond issue for necessary expenses has been submitted to and approved by the voters of a city, according to a statutory requirement, but it appears that it is in violation of the city's charter requiring that no ordinance or resolution respecting such matters be finally passed on the date of its introduction, it is within the authority of a subsequent Legislature to validate the issuance of the bonds by direct legislation, not requiring the proposition to be again submitted to the voters; nor is objection material that the validating act refers to bonds already delivered when in fact they had only been prepared, and were refused by the purchaser."

The Court, in its opinion, further observed generally that under our decisions, and on the facts in evidence, the bonds are for necessary expenses, and are not therefore, subject to the constitutional restrictions on municipalities as to incurring indebtedness, contained in Article VII, section 7, of the Constitution. *Murphy v. Webb,* 156 N. C., 402; *Comrs. v. Webb,* 148 N. C., 120; *Fawcett v. Mount Airy,* 134 N. C., 125; *Black v. Comrs.,* 129 N. C., 121; *Vaughn v. Comrs.,* 117 N. C., 434. The municipalities, however, in matters of this character, are very largely subject to legislative control, and as to incurring indebtedness and other questions, governmental in character, they must observe the statutory requirements under which they act. *Allison v. Williams,* 152 N. C., 147; *Hendersonville v. Jordan,* 150 N. C., 35; *Robinson v. Goldsboro,* 135 N. C., 382; *Wadsworth v. Concord,* 133 N. C., 587. This last position, however, is subject to the principle, very generally recognized, that when defects and irregularities are by reason of the violation or nonobservance of statutory provisions, and unless vested rights have supervened, the objections may be removed and the measure validated by proper legislative action. *Reid v. R. R.,* 162 N. C., 355-358; *Grenada County Supervisors v. Brown,* 112 U. S., 261, 271; *Illinois v. Ill. Cen. R. R.,* 33 Fed., 721-771; *Schenck v. Jeffersonville,* 152 Ind., 204-217.

In *Reid's case, supra,* the Court said: "It is well recognized that, so far as the public is concerned and when not interfering with vested rights, a Legislature may ratify and make valid measures which it might have originally authorized." In *Board Supervisors, etc., v. Brown, supra,* it was held: "That a municipal subscription to the stock of a railroad company, or in aid of the construction of a road, made without authority previously conferred, may be confirmed and legalized by subse-

quent legislative enactment, when legislation of that character is not prohibited by the Constitution, and when that which was done would have been legal had it been done under legislative sanction previously given," and in *Schenck's case, supra,* "In the absence of constitutional restriction, the Legislature has the right to legalize the bonds of a city so long as vested rights have not intervened." *Anderson v. Wilkins,* 142 N. C., 154.

We have closely and carefully examined the assignments of error singly and collectively, and find that the most of them, say the first twenty-two in number, are to matters clearly competent in form and strictly relevant to the issues in the case, and have been in one way or another so frequently considered and decided by this Court, that we deem any further discussion of them, or any beyond that we have devoted to them, as being unnecessary. No new principle is involved, and we would add nothing at all novel to our stock of precedents, but simply reiterate what we have heretofore so often held.

This brings us to the charge, which appears to cover the case completely, and to be without flaw. The computation as to the town's indebtedness was simple and the correct result easily ascertained. The jury decided that the provision as to the limitation of the bond issue to 8 per cent of the total assessed valuation of taxable property has not been transgressed. The court properly instructed the jury that the judge and jury had nothing to do with the questions as to whether it is wise to incur the indebtedness, or issue the bonds for public improvements, or as to whether the method suggested, or proposed, by the local authorities for laying out and constructing the roads or streets is the best one or not, and that no duty or responsibility for the same rested upon the court or jury, but that they were confined simply, that is, the jury, to finding the facts, and the judge to declaring the law arising thereon. In all respects, upon this phase of the case, the judge correctly and fully instructed the jury—without question, and this also is true as to the assessments, and what we have just said applies most assuredly to the question as to whether the roads or streets and sidewalks should be hard-surfaced, laid in cement, asphalt, or concrete, and of what width, are manifestly matters left to the judgment and sound discretion of the local authorities to whom the law has committed or confided the same. It having been determined what is 8 per cent of the taxable value of town property, after proper deductions were made for that purpose, and that all necessary and required preliminaries had been observed, in the way of a petition, and so forth, the jury properly returned the following verdict:

"1. Is the aggregate amount of the bond issue, less the deduction allowed by law, in excess of 8 per cent of the total assessed valuation of the property of the town of Hillsboro for the year 1922? Answer: 'No.'

"2. Were the petitions filed for local improvements on King and Churton streets signed by a majority of the persons owning property within the proposed improvement district, as required by the statute? Answer: 'Yes.'"

The judgment of the court logically followed the verdict, as properly interpreted and understood in the light of the evidence and the charge of the court.

Mr. Chester Turner presented his case very strongly for the plaintiff, and as convincingly as the facts of the case permitted, but when all things are considered, the correctness of the rulings by Judge Connor, who presided at the trial, and of all the other proceedings, especially when, as we repeat, they are taken in connection with the statute curing defects, if any, and validating the election, and so forth, we do not now see how we can do otherwise than overrule all exceptions and affirm the judgment of the court, which we now do.

But as the Legislature has cured any defects or irregularities in the proceedings, including those affecting the election, and its preliminaries, we cannot now see, with this fact alone before us, any ground upon which we can interfere and grant relief to the appellant.

As suggested in the defendant's brief, and resting what we will now state solely upon it, the plaintiff may, perhaps, further pursue his remedy, if he has any, hereafter, but as the record now stands, we can find no reason sufficient for a reversal or for a modification of the judgment.

We therefore declare that we find no error in the record, and it will be so certified to the lower court according to the statute.

No error.

WALKER, J. Since the above case was argued before us, the plaintiff has moved for a new trial, upon the ground of newly discovered evidence. We said, in *Johnson v. R. R.*, 163 N. C., 431, at p. 453, that "applications of this kind, as we have held, should be carefully scrutinized and cautiously examined, and the burden is upon the applicant to rebut the presumption that the verdict is correct, and that there has been a lack of due diligence. 14 A. & E., 790. We require, as prerequisite to the granting of such motions, that it shall appear by the affidavit: (1) That the witness will give the newly discovered evidence; (2) that it is probably true; (3) that it is competent, material, and relevant; (4) that due diligence has been used and the means employed, or that there has been no laches in procuring the testimony at the trial; (5) that it is not merely cumulative; (6) that it does not tend only to contradict a former witness or to impeach or discredit him; (7) that it is of such a nature as to show that on another trial a different result will probably be reached,

and that the right will prevail," citing *Turner v. Davis,* 132 N. C., 187; *S. v. Starnes,* 97 N. C., 423; *Brown v. Mitchell,* 102 N. C., 347; *S. v. DeGraff,* 113 N. C., 688; *Shehan v. Malone,* 72 N. C., 59; *Mottu v. Davis,* 153 N. C., 160; *Aden v. Doub,* 146 N. C., 10.

Upon careful consideration of the application in this case for a new trial, we are of the opinion that the plaintiff has not brought the same within the rule repeatedly laid down by this Court in the *Johnson case, supra,* and in other decisions, and that there are several respects in which he has failed to do so, not necessary now to be enumerated. We could not well grant his application for a new trial upon the showing made by him without seriously impairing the integrity and strength of the said rule, which has been consistently maintained for many years. We have heretofore refused numerous applications which more nearly comply with our rule than does the one which is now in question, but we may further say that we are not induced to believe, in the face of the statute validating the election held to ascertain the will of the people in regard to the issuing of bonds and the making of assessments that the plaintiff has shown his ability to reverse the result in this case, or even to modify the same.

The motion, therefore, for a new trial upon the grounds stated in the papers must be denied.

Motion denied.

VIOLET D. WALKER ET AL. v. NAT. H. WALKER ET AL.

(Filed 18 April, 1923.)

1. Judgments—Consent—Modification.

A consent judgment is in effect a contract between the parties entered with the consent of the court, and resting upon their agreement it can only be changed by the court with their consent, and is enforced by the court as its judgment in accordance with its terms.

2. Same—Inheritance—New Propositus.

In proceedings to partition lands the defendants pleaded sole seizin as the only heirs at law of the blood of their grandparents, the original owners, through their mother, and in their action to set aside a deed in entireties to their parents from their grandparents, for mutual mistake, and to establish sole seizin in their mother, upon the ground that the conveyance of the land was only intended as an advancement to her and without other consideration, a consent judgment was entered vesting title to a part of the lands in themselves as heirs at law of their mother, and to the other part in their father. The plaintiffs are the children of the father by a second and third marriage, and not of the blood of the original owners: *Held,* the consent judgment shut off the defendants' line of descent from the grandparents and converted the estate into one of purchase by the parties designated in the judgment, establishing thereby a

new origin and stock of descent, from whom alone a title could be acquired either by inheritance or purchase.

3. Appeal and Error—Record.

The record of a case on appeal to the Supreme Court should be prepared to avoid confusion and to present the facts consecutively and in regular order; and the record in this appeal is not commended.

APPEAL by defendants from *Shaw, J.*, at June Term, 1922, of BUNCOMBE.

This is a petition for partition of lands before the clerk, the plaintiffs claiming that they are tenants in common with the defendants in the lands. The defendants Nat. H. Walker and Louisa M. Walker filed an answer alleging sole seizin by them, and the case was transferred to the civil issue docket. It was heard upon the agreed statement of facts, and from the judgment in favor of the plaintiffs the defendants appealed.

The lands in question are a portion of a tract of land which prior to 1887 were owned by E. B. Kerlee and his wife, Mary Kerlee. At that time William St. George Walker, the father of the plaintiffs and of the defendants, was married to Emma Kerlee, who was a daughter of E. B. Kerlee and Mary Kerlee and mother of the defendants Nat. H. Walker and Louisa M. Walker. These two defendants are the only living children of said Emma Kerlee Walker, who died in 1901. After her death William St. George Walker married a second wife, Dolly Walker, and the plaintiffs Violet D. Walker and the other three plaintiffs are his children by said second wife. In 1914 the said Dolly Walker obtained a divorce from her husband and he married a third wife, Dolores, and the defendants Wilma P. Walker and William St. George Walker, Jr., are the children of the third marriage.

The defendants Nat. H. Walker and Louisa M. Walker were the only persons appealing in this case, claiming sole seizin of the lands described in the petition, for the reason that they are the only parties to this action who are of the blood of the purchasing ancestor (E. B. Kerlee and his wife, Mary Kerlee), from whom the lands came, they having been owned by E. B. Kerlee and wife, Mary Kerlee, the mother of Emma Kerlee Walker, who in turn was the mother of the defendants, Nat. H. Walker and Louisa M. Walker, and was of no relation to the other plaintiffs or defendants in this action.

In October, 1887, and on 30 April, 1890, the said E. B. Kerlee and wife, Mary Kerlee, conveyed the lands in controversy to William St. George Walker and wife, Emma Kerlee Walker. After the death of Emma Kerlee Walker, her children instituted a suit against William St. George Walker, their father, for the possession of these lands, and in the complaint averred that the conveyance by their grandfather, E. B. Kerlee, and wife, was an advancement to their mother, Emma Kerlee

Walker, and a portion of her inheritance from her father and mother; that the conveyance was made without any consideration whatever, except as an advancement to Emma Walker as a portion of her inheritance, and that in the final disposition of the estate of E. B. Kerlee and Mary Kerlee, the said tract of land so conveyed was charged against Emma Kerlee Walker in accordance with the intention of her ancestors when the deed was executed and delivered. They alleged that it was not intended by the grantors that by said deed William St. George Walker should own any interest in lands, except such as he would be entitled to by law as tenant by curtesy, and that E. B. Kerlee and Mary Kerlee, not being advised in law, and being ignorant of the doctrine of survivorship, the name of William St. George Walker, by mistake and inadvertence, was inserted in the deed, but that he was not entitled to any portion of said lands except his life estate as tenant by curtesy on account of his marriage to the said Emma Kerlee Walker.

The plaintiffs made other allegations against William St. George Walker, who filed an answer admitting that Emma Kerlee Walker was the daughter of E. B. Kerlee and Mary Kerlee, and that the lands were deeded by them, as aforesaid, but denying that the deed was made as an advancement to their daughter, his wife, and claiming ownership of the lands as survivor in an estate by entirety.

At October Term, 1915, of Buncombe, a compromise judgment was entered awarding a portion of the lands involved in the action to the children of the said Emma Kerlee Walker, namely, Nat. H. Walker, Charlotte M., Marian, and Louisa M. Walker, and apportioning the other part of the lands to the defendant therein, William St. George Walker, each respective party to hold their lands in fee.

Subsequent thereto, the four children of Emma Kerlee Walker partitioned the portion of lands awarded to them under the judgment above mentioned, and the lands in controversy in the case now pending were allotted to Charlotte M. Walker in the said partition proceedings. Later Charlotte M. Walker and Marian Walker died intestate without leaving any children, and the only surviving full brother and sister of the said Charlotte M. Walker are the defendants, Nat. H. Walker and Louisa Walker, they being the only surviving lineal descendants of their mother, Emma Kerlee Walker, who was the only lineal descendant of E. B. and Mary Kerlee Walker, and they claim, therefore, that they are the sole owners of the lands in controversy.

F. W. Thomas for plaintiffs.
Jones, Williams & Jones for defendants.

WALKER, J., after stating the case: Our decision must turn on the true construction and operation of the consent or compromise judgment

or decree entered at October Term, 1915, of Buncombe Superior Court. As this decree was entered by the consent of the parties to it, we cannot revoke or materially change it without their consent. The court took no part in rendering the judgment, but by the consent, and at the request of the parties to it, permitted it to be entered on its records as a memorial of it. It has the force and effect of a judgment, but only by the consent of the parties to it. It is therefore their judgment, having the force and effect of an agreement between them, and the court will undertake to enforce it, but only as it has been agreed upon and not otherwise. *Kerchner v. McEachern,* 93 N. C., 447. That case decided two propositions, as follows:

"1. A court has power to set aside and vacate a consent judgment for fraud or surprise, but it cannot alter or correct it, except with the consent of all the parties affected by it.

"2. In order to set aside a consent decree, on the ground that there has been a mutual mistake in the terms in which it was entered, it must appear that there was a common intention and understanding which fails to find expression in the decree."

The parties to the consent judgment not having mutually agreed that it may be set aside or altered in any respect, they must abide by it, as it is written in the record of the case, and this brings us to consider what is the legal effect of it upon the title to the land in dispute.

The defendants contend, as we understand them, that as they are of the blood of the first purchasers, who were, as is asserted, E. B. and Mary Kerlee Walker, they being the only lineal descendants of said couple, but this will depend upon what was the legal effect, if any, of the "consent decree" in changing the course of this descent, or, if stated differently, in establishing a new stock of descent in the defendant William St. George Walker as a new propositus (2d Blackstone, marg. p. 203) or origin of descent, so to speak. We are of the opinion, and so hold, that the defendants' contention is wholly untenable, because the course of the original descent from their grandparents, E. B. and Mary Kerlee, was abruptly terminated by the agreement and decree, and the title to one portion of the land vested in them and title to the other portion in William St. George Walker; and for a part of the land allotted to Charlotte M. Walker, in the final partition between her and her cotenants, that is, Nat. H. Walker, Charlotte M. Walker and Marian Walker, this action is brought, and how this was done is the very question we must now consider and decide. The decree (in the case of *Nat. H. Walker and Marian Walker v. William St. George Walker*) provided as follows:

"This cause coming on to be heard, and it appearing to the court that it has been compromised and settled upon the following terms (set out

below); it is therefore ordered, adjudged, and decreed that the plaintiffs are the owners in fee and entitled to the possession of the following parts of the land in controversy, to wit: Four lots (1, 2, 3, and 4) in Block 2, described in a plat duly registered in Buncombe County, and all the lands in controversy lying east of the Daugherty line and east of Ridgeway Avenue, as laid out or projected, except the lands hereinafter adjudged to belong to the defendant, and that the defendant is adjudged and decreed to be the owner in fee of the following described lands, and that plaintiffs have no right, title, or interest therein, to wit: All the lands in controversy lying on the west side of Ridgeway Avenue, except said lots 1, 2, 3, and 4 of Block 2, above adjudged to belong to the plaintiffs, and the defendant is also adjudged to be the owner in fee of the following described piece of land lying on the east side of said Ridgeway Avenue, to wit: Beginning at a stake, at the junction of said Ridgeway Avenue and the public road (therein described), and runs according to designated courses and distances, and metes and bounds, set forth therein to the beginning corner at the road, containing ten acres, with certain exceptions or reservations not material to be stated here. For greater certainty, reference is made to the original decree of October Term, 1915."

It will be seen, therefore, that by consent and agreement of the parties the several interests described in the decree were by it conveyed to and vested in the parties named therein, so that they became the owners thereof in fee, not by descent from their parents or grandparents, nor by descent at all (except from their father William St. George Walker), as claimed by the plaintiffs in this action, *Violet D. Walker et al. v. Nat. H. Walker et al.*, but they acquired their right, title, and interest in the lands by descent from their father, who acquired it by purchase under the decree of the court above set forth. The contention that the consent decree merely defined or ascertained by metes and bounds, or other particular description, the part of the land that was allotted to each of the parties, cannot be conceded, but must be repudiated, being contrary to the law as applicable to the facts. The very terms of the consent decree show that such cannot be the case. It sets forth that the parties have not settled according to their legal or equitable rights in the lands, but have compromised the litigation between themselves upon the terms specified therein, and that Nat. H. Walker and others shall own certain portions of the lands, in their own right and in fee, and that William St. George Walker shall own in his own right and in fee a certain other portion of the same, and it all clearly and distinctly excludes the idea, which is the only foundation of the conflicting claim, that any of them derive his or her share by any descent from their ancestors. If it were otherwise, William St. George Walker could not get an estate in fee, but

only a life estate, as tenant by the curtesy, by reason of the alleged descent to and ownership of his first wife, he having married three times.

It is said, however, that *Harrison v. Ray,* 108 N. C., 215, decides to the contrary, but we do not think so, when that case is properly considered. It decided three propositions, as follows:

"1. Under a deed or devise of land to husband and wife, the vendees or devisees take an estate in entirety, and upon the death of one of them the other takes the whole estate by right of survivorship.

"2. Upon an actual partition of lands among tenants in common, the tenants take their respective shares or allotments by descent and not by purchase.

"3. Where a partition was made by consent, and the tenants mutually conveyed, by deed, to each other the several allotments: *Held,* (1) the deeds conveyed no real estate (that is, no title thereto), but simply ascertained by metes and bounds the interest of each, and destroyed the unity of possession; and (2) the deeds did not operate as an estoppel, except so far as they established the extent of the interest of each tenant in his ancestor's lands."

It will be noticed that as the first two propositions laid down in that case, there is no contention between us. We admit the law to be as there stated in regard to an estate by the entireties, and as to the second, it is true that the tenants take by descent, provided they acquired their estates in that way, that is, by descent. As to the third of the propositions, if the partition is made by consent, without anything else being said, and without being qualified by any other provisions, the rule therein laid down as to the effect of the division would be correct, but here we come to the parting of the ways, as in this case there is a qualification and a new estate created, with qualities different from the original one, for it is provided in the consent decree that William St. George Walker shall take, not the estate he would acquire, if there was still a descent to and from his first wife, that is an estate by the curtesy for life, but an estate in fee simple, and if he takes because of the doctrine as to entireties being applicable, he would still have an estate in fee, but one acquired not by descent but by purchase, under the express terms of the deed to him and his wife without any qualification, so that which ever way it is given, he is in, not by descent, but by purchase. It is apparent from the face of the decree that the parties intended to change and did change the course of inheritance, or rather, to be more accurate, they put an end to it entirely, and thereby converted the estate by descent into one by purchase, establishing thereby a new origin and stock of descent from the parties named in the decree instead of from their parents, or their ancestors in blood. Only those could, thereafter, take an estate of inheritance in the land set apart to the several parties named in the

decree, who claimed by descent or purchase from those named therein and who took thereunder.

In *Lumber Co. v. Cedar Works*, 165 N. C., 83, we discussed and decided the question as to the effect of a deed executed under an order of the court in partition proceedings where all the interested tenants had not been made parties to the suit, and we held that the deed was good color of title and all rights would be barred by the requisite adverse possession under it, following *Amis v. Stephens*, 111 N. C., 172 (opinion by the present *Chief Justice*), and other cases. This was so held because the proceedings and the decree destroyed the tenancy, and established a new title, originating in the purchaser at the sale or under the decree. While this case is not exactly in point, it furnishes an analogy.

It was said in *Bunn v. Braswell*, 139 N. C., 135: "The judgment of Spring Term, 1889, being by consent, is to be construed as any other contract of the parties. It constitutes the agreement of the parties made a matter of record by the court at their request. . . . The judgment is therefore to be construed in the same way as if the parties had entered into the contract by writing duly signed and delivered." *Gaston, J.*, in *Wilcox v. Wilcox*, 36 N. C., 36, said that a consent judgment "is the decree of the parties." *Dillard, J.*, in *Edney v. Edney*, 81 N. C., 1, said: "A decree by consent is the decree of the parties put on file with the sanction and permission of the court; and in such decrees the parties acting for themselves may provide as to them seems best concerning the subject-matter of the litigation." *Kerchner v. McEachern, supra; Stump v. Long*, 84 N. C., 616; *Vaughan v. Gooch*, 92 N. C., 524; *Massey v. Barbee*, 138 N. C., 84; *Bank v. McEwen*, 160 N. C., 414.

Before closing, we must say that we cannot commend the record in this case for a model, as there is some confusion in it, and the facts are not presented consecutively and in regular order. The exceptions and assignments of error appear immediately after Judge Long's judgment of October, 1915, and not after that of Judge Shaw, the one from which the appeal was taken. It would have promoted clarity of statement considerably if the stages of the proceedings had been stated in the natural order of sequence.

The learned judge who presided at the trial in the court below, Judge Shaw, was of the opinion, and so correctly decided, that plaintiffs could not claim under Charlotte M. Walker, there being no descent from her to them, because the descent was destroyed by the consent decree, and we should therefore affirm the judgment, which is now done, and it will be so certified.

Affirmed.

CLARK, C. J., dissenting.

JAMES G. DAVIS, DIRECTOR GENERAL OF RAILROADS, AND SOUTHERN RAILWAY COMPANY, v. LATHAM-BRADSHAW COTTON COMPANY.

(Filed 2 May, 1923.)

1. Carriers of Goods—Railroads—Tariffs—Reshipment—Interstate Commerce Commission.

In relation to interstate shipments by common carriage, where the interstate commerce commission has accepted the published tariff of a railroad company, allowing the shippers of actual transit cotton the privilege of concentration and reshipment with a reduction of charges, at a designated station for shipments originating on its own line, expressly excluding substitution of cotton shipped to it by rail or otherwise: *Held*, carload shipments over a connecting carrier to a station on the line of said railroad, with a bill of lading from that station, given for the unbroken car, in its continuous shipment, does not conform to the requirement that the shipment must originate at a station on the line of the railroad publishing the tariff, or accord to the shipper the right of concentration at and reshipment from the designated station under the reduction of the charges.

2. Same—Bills of Lading.

Where an interstate shipment of cotton is not entitled to the provisions accorded by a railroad company for concentration and reshipment at a designated station, with reduction of charges, because it had not originated on the line of the carrier publishing the tariff, the issuance of the bill of lading by the agent at a station on its own line and accepting the freight charges, cannot alter the position of the shipper so as to give him the concentration and shipment privileges, contrary to the provisions of the carrier's tariff filed with and accepted by the Interstate Commerce Commission.

3. Same—Federal Law—Discrimination.

Where a railroad company has filed and published its tariff as to concentration and reshipment privileges, at a certain station on its line of railroad, permitting a reduction of charges, neither the carrier nor its shipper may violate the Federal law by according or accepting the reduction for shipments of cotton contrary to the conditions named in the tariff, and the carrier may recover the amount of such reduction from the shipper when its own agent had received the shipment and freight charges, and has improperly issued the bill of lading therefor.

4. Carriers of Goods—Railroads—Tariffs—Contracts—Interpretation of Contracts.

In construing the meaning of a tariff published by a railroad company and approved by the Interstate Commerce Commission, allowing at a designated station on the carrier line concentration and reshipment of cotton when originating on the carrier line, with reduction of charges, the intent of the parties as gathered from the language used will control its meaning; which will not be extended to include shipments received from connecting lines of carriage, and transported over the carrier's own line in unbroken or unloaded cars in continuous passage.

APPEAL by plaintiffs from *Stack, J.*, at January Term, 1923, of GUILFORD.

This was a civil action, tried in the Superior Court of Guilford County. There is no controversy as to the facts, the same being set out in the written agreement, and it being also further stipulated that if the defendant is indebted on account of the matters and things alleged in the complaint, the amount of such indebtedness is the amount demanded in the complaint.

The facts being admitted, the only question to be determined is whether, under the provisions of the published tariff "I. C. C., No. A-6895," the cotton shipped by the defendants was entitled to concentration and reshipment privileges mentioned in the tariff at Greensboro, and this is the subject of the single assignment of error. To put the question differently: Did this cotton, under the agreed facts, originate at Goldsboro or other stations on the Southern Railway, and was it "actually transit cotton, entitled to the reshipping privileges of Southern Railway Company under the rules contained in said tariff?"

The original rules in the tariff contain the following language: "Uncompressed cotton that has been concentrated at Greensboro, N. C., may be reshipped to destinations specified hereinafter when originating at stations on Southern Railway and other lines named herein, subject to the following rules:

"Rule 3 B. Bill of lading will be issued by the agent of this company, at Greensboro, N. C., for cotton reshipped to cover the movement from original point of shipment to final destination; and the original point of shipment must be shown on the face of the bill of lading.

"Rule 3 E. Way-bills issued to cover the cotton from Greensboro, N. C., shall show in the consignor's column the point of original shipment of the cotton and the way-bill number and date corresponding with the expense bills surrendered.

"Rule 4 B. Substitution of cotton brought in by wagons or by rail from nontransit points, or cotton brought in on transit rates, will not be permitted."

In the reshipping certificate to be signed by the shipper, the following language is used: "And is not wagon or river or other nontransit cotton." The substituted rules, effective 20 October, 1917, state:

"Rule 3 E. 1. To destinations specifically provided for in tariff, as amended, through rates lawfully on file with the interstate commerce commission (in effect on date of bill of lading covering movement from original point of shipment to Greensboro, N. C., will be applied from point of origin to such destination.)

"(b) Bill of lading will be issued by the agent of this line at Greensboro, N. C., for cotton reshipped to cover the movement from the original point of shipment to final destination; and the original point of shipment must be shown on the face of the bill of lading.

"(e) Way-bills issued to cover the cotton from Greensboro, N. C., shall show in the consignor's column the point of original shipment of the cotton, and the way-bill number and date corresponding with the expense bills surrendered.

"Rule 4 A. (b) Substitution of cotton brought in by boats or wagons or by rail from nontransit points, for cotton brought in on transit rates, will not be permitted."

In order to have a better understanding of the case and the questions intended to be raised in it, we insert here a part of the case on appeal tendered by the plaintiff, appellant, with the agreement of the parties as to the facts:

That the defendant is a corporation, chartered and doing business under the laws of the State of North Carolina, engaged in buying, selling, shipping, and storing cotton. That during the year 1918, from time to time, the defendant alleged that it shipped a large number of bales of cotton from Goldsboro, N. C., and other points, to Greensboro, N. C., warehoused the same at Greensboro, and thereafter reshipped said cotton to points in and outside the State of North Carolina, claiming Goldsboro and other points of shipment mentioned as the point of origin of said shipments, and thus obtaining, under the provisions of Southern Railway Tariff I. C. C., A-6895, a copy of which tariff was attached to the complaint and made a part of it, a through rate of shipment from Goldsboro to the final point of destination to which said cotton was shipped. That, in fact, Goldsboro and the other points named were not the points of origin, and the defendant was not entitled to the through rate under the tariff, but should have paid a different and higher rate fixed for said shipments.

A complete list of the shipments, showing the pro number, the bill weight, the freight paid and received, number of bales, the weight of the portion of shipment not entitled to the through rate, the correct rate to be applied, the amount of freight which should have been paid and collected, the amount of undercharge, and the actual point of origin of each shipment was attached to the complaint.

The plaintiffs allege that by reason of the defendant obtaining an illegal and unlawful rate of freight upon said shipments, under the representation that Goldsboro and other points mentioned were the points of origin, under the provisions of said tariff, that the defendant was indebted to the plaintiffs, in addition to the freight that was paid by it, in the sum of $2,800.04.

The defendant filed an answer denying that Goldsboro and the other points referred to in the complaint were not the points of origin of the cotton alleged to have been shipped from Goldsboro and other points to Greensboro, and there warehoused, and thereafter reshipped to other

points in and out of the State of North Carolina, and denying that defendant was not entitled to a through rate on shipments to which said cotton was finally shipped; and denying that the defendant should have paid a different and higher rate than that paid by it; and denying that the defendant was indebted in any way to the plaintiffs for freight for the shipment of said cotton, after the same had been warehoused, under said tariff.

AGREED STATEMENT OF FACTS.

The plaintiff and the defendants in the above entitled cases, through their counsel of record, hereby agree to the following facts:

The first movement of each of the shipments of cotton shown on the schedules attached to the complaints in the above entitled actions was from the point or points indicated in the column in the extreme right of the sheets attached to said complaints, to Goldsboro or other station on the Southern Railway; that these shipments came over the lines of the Atlantic Coast Line Railway Company and the Norfolk Southern Railway Company, from the points indicated, to Goldsboro or other station on the Southern Railway; and that the freight thereupon was by defendants either prepaid to Goldsboro or other station on the Southern Railway, or paid upon arrival at Goldsboro or other station on the Southern Railway to said Atlantic Coast Line Railroad Company or said Norfolk Southern Railway Company. That at Goldsboro or other station on the Southern Railway the said Norfolk Southern Railroad and Atlantic Coast Line Railroad Company were receipted for the said shipments by the defendants, or the agent of the defendants; that thereafter the defendants or their agent procured said shipments to be delivered, in the same cars, seal unbroken, to the Southern Railway Company upon its tracks at Goldsboro.

Upon said cotton being delivered to the agent of the Southern Railway Company at Goldsboro, and upon its tracks, the Southern Railway accepted it for shipment to Greensboro, N. C., charging the local rate. That upon arrival at Greensboro the shipment was warehoused, and later shipped out under the warehousing and reshipping privilege contained in Tariff I. C. C., A-6895, governing the concentration and reshipment of cotton.

Counsel for plaintiffs and defendant filed with the court an agreed statement of facts, which is the one above stated in full, and also further stipulated that if the defendant be found by the court to be indebted to the plaintiffs on account of the matters and things alleged in the complaint, the amount of such indebtedness, subject to errors of mathematical computation, is the amount demanded in the complaint. The case was submitted upon the agreed statement of facts and the stipulation

mentioned above; and his Honor being of the opinion, after considering the same, that under the facts agreed the shipment of cotton mentioned in the complaint originated at Goldsboro and other Southern Railway stations mentioned in the tariff, and that there were no further freight charges due the plaintiffs upon the same, and that the plaintiffs were not entitled to recover, rendered the judgment set out in the record.

The plaintiffs excepted to this finding of the court, and to the judgment signed in the cause, and appealed to the Supreme Court.

Wilson & Frazier for plaintiffs.
Bynum, Hobgood & Alderman for defendant.

WALKER, J., after stating the case, delivers the opinion of the Court: The above statement of the facts fairly presents the important question we must deal with in this case.

The language of the tariff and the rules we have cited preclude the idea or inference that any cotton other than that originating at a station on the Southern Railway, and named in the tariff, and which is the point of origin, should be entitled to concentration and reshipment privileges.

We are of the opinion that the legal meaning, under the tariff, of the words "originating at" and "point of origin" is that of the first point of shipment, the point from which the cotton was first shipped by freight, which, according to the agreed statement of facts, was from some station or stations on the Atlantic Coast Line Railroad Company, and not from Goldsboro or other points of the Southern Railway Company mentioned in the tariff, and hence that such cotton was not entitled to concentration and reshipment privileges, and reduction of charges, from Greensboro under said tariff schedule, and the fact that a new bill of lading for such cotton shipped from other points than those named in the tariff and over other roads than the Southern Railway, was after its arrival at Goldsboro issued by the Southern Railway Company, to Greensboro, the point of concentration and reshipment, would not and could not, in law, make Goldsboro the point of origin of such cotton, nor would such cotton be that originating at Goldsboro, the only possible place of origin on the Southern Railway.

The shipment started at Mt. Olive, in the one case, and at other points of the Atlantic Coast Line and Norfolk Southern Railways, and in no sense, or in no admissible or practical sense, can it be deemed an original shipment of the goods from Goldsboro, or any other point or station of the Southern Railway, to Greensboro, the alleged place of concentration and reshipment to other distant points on other lines, they being their final destination. The Cyclopedic Law Dictionary defines the word "original" as that which is first in order; an authentic instrument of

something, and which is to serve as a model or example to be copied or imitated. It also means first, or not deriving any authority from any other source; as, original jurisdiction, original writ, original bill, and the like. And the same is said of the word, however it may be associated with a noun or substantive (such as, original shipment, original station, and other like use of it) in Black's Law Dictionary and Bouvier's Law Dictionary, and this meaning is generally if not universally assigned to it by all lexicographers. It is something that necessarily implies that there is nothing going before it, but it "starts things" always, the beginning, whatever and wherever may be the end, or the ending. With this accepted meaning of the word, how can it reasonably be asserted that the shipment in this case originated at Goldsboro? Take the shipment which started at Mt. Olive as typical of all of them. The cotton was brought from Mt. Olive to Goldsboro, and there turned over to the Southern Railway Company to be transported by it over its own line to Greensboro, without breakage of bulk, or any, even the slightest, interference with it. It remained in the same car into which it was loaded at Mt. Olive, and at other stations on the Atlantic Coast Line Railway line, and no part of it was removed therefrom or disturbed in any way, and it continued in that state and condition until it had made its journey, completed the same, and arrived at its destination in Greensboro. This being so, how can it be said, with any show of reason, that the mere giving by the agent of the Southern Railway at Goldsboro of what is called a bill of lading (really nothing more in effect than a receipt for the goods), and even the paying of the freight charges by defendant to that point, will by any possible argument or legal legerdemain convert into an original shipment from Goldsboro, which is on the line of the Southern Railway Company, what in fact and in law is not one? The original point of shipment, in the case selected by us as typical, was Mt. Olive. The cotton was from the start evidently intended for a through shipment from Mt. Olive to Greensboro. Otherwise, if intended for Goldsboro, they would have been removed from the cars in which they were carried to that place and warehoused or taken away by the consignee for whom they were intended, and not left in the car intact and hauled to Greensboro in the same car, without molestation or change of any kind.

If the Southern Railway Company, as carrier, or Latham-Bradshaw Company, as cotton factors, or merchants, at Greensboro, had originally taken a bill of lading from the Atlantic Coast Line Railroad Company for a shipment of the cotton to Goldsboro and removed the same from the car, or had it removed, and warehoused at Goldsboro and then reshipped it by the Southern Railway line to Latham-Bradshaw Company at Greensboro, it may be that a different case would have been presented,

though we do not venture any opinion as to that at this time, as they did not do so, and, therefore, it would merely be a *dictum* if we did. We therefore decide only the case in hand, and the single question involved in it.

The defendant's counsel cited us to *Chic. M. & St. P. Ry Co. v. State of Iowa,* 233 U. S., 344, and that case, if not closely read and considered, might seem to lend some countenance to the position taken by defendant here, but when differently construed upon a more careful reading and upon greater deliberation, we can see several distinguishing features between that case and the one at bar. The Court there was dealing with several and various questions, one the construction by the State Court by which it felt that it was bound, another by the statement in the record of the case as it appeared in the State Court, and also in the Federal Supreme Court, "that the facts showed that the coal was originally consigned to the coal company in Davenport, *that it was there held until sales were made,* that the consignee had taken delivery, paying the freight to the initial carrier *and assuming full control,*" citing 152 Iowa, 317, 319. The latter Court said that "the record disclosed no ground for assailing this finding." In these respects, and some others not less striking or controlling, the two cases are quite different, and we are strongly inclined to think that the decision in that case, when properly construed, is an authority for our present decision in this case, instead of being in conflict with it, and our view seems to be that of those who are thoroughly familiar with such questions and regarded as experts in unraveling the usually confused and intricate meshes of railroad tariffs, which are more calculated to mislead than to enlighten the public. We should be careful to see that by no mere form or device should railways, or their patrons, be permitted to violate the laws, in spirit or in truth, either of our own government or those of the Federal system, which are by our own and by the Constitution of the United States declared to be supreme. This attempt to transgress the law of the Federal Government by not complying with the lawful tariff approved by the Interstate Commerce Commission cannot be approved by us. We ourselves have held that such will not be permitted by this Court, but will be sternly rebuked.

We held in *Peanut Co. v. R. R.,* 166 N. C., 62, 67, that it is the duty of a carrier to charge for freight strictly according to the published rates, and it is illegal to charge less. He had the right to charge the proper or established rate and the duty was imposed upon him to do so, notwithstanding he had quoted a different and lower rate to the plaintiff, who had actually made all the shipments of his peanuts believing the lower rates to be the true and lawful rate. And this is so, because to charge a rate, even a lower rate, than the one fixed by its published schedule, would be in direct violation of the provision of the Interstate Commerce

Act, which prohibits a carrier "to charge, demand, or collect or receive a greater or less or different compensation for transportation of passengers or property, or for any service in connection therewith, between the points named in its tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time; nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privilege or facilities in the transportation of passengers or property, except such as are specified in such tariffs," filed with and approved by the Interstate Commerce Commission, and the carrier is forbidden to engaged or participate in the transportation of passengers or property unless the rates, fares, and charges for the same have been filed and published in accordance with the provisions of the act. Hamlin on Interstate Commerce Acts, pages 11 and 12. It has been held under the act that a carrier must require payment of the lawful or published rate, even though its agent had misrepresented the rate, and it had agreed to take the goods for shipment at a lower rate, the published rate being the only lawful one. *Peanut Co. v. R. R., supra; Railway Co. v. Hefly,* 158 U. S., 98; *Railway Co. v. Mugg,* 202 U. S., 242; *Railway Co. v. Abilene Cotton Oil Co.,* 204 U. S., 426; *Railway Co. v. Elevator Co.,* 226 U. S., 441. This doctrine of *Peanut Co. v. R. R., supra,* is approved and affirmed in *R. R. v. Latham,* 176 N. C., 417, though the case is not cited. See, also, *R. R. v. Mugg,* 202 U. S., 242; *R. R. v. Birmingham Sand and Brick Co.,* 9 Ala. App., 419; *R. R. v. New Albany, etc., Basket Co.,* 48 Ind. App., 647; *Holt v. Wescott,* 43 Me., 445; *Mfg. Co. v. R. R.,* 149 N. C., 261.

In the *Mugg case, supra,* the United States Supreme Court held that "A common carrier may exact the regular rates for an interstate shipment as shown by its printed and published schedule on file with the Interstate Commerce Commission and posted, etc., as required by the Interstate Commerce Act, although a lower rate was quoted by the carrier to the shipper who shipped under the lower rate so quoted." And in *Central of Ga. v. Birmingham Sand and Brick Co., supra,* the Court held that, under the Interstate Commerce Act, "the freight rate of an interstate shipment is not that named in the bill of lading or contract of shipment, but the lawful rate existing at the time, whether or not such rate is known to the consignor or the consignee, and regardless of whether the parties were misled by the carrier as to the lawful rate, or whether it had posted the lawful rate as required by the statute; hence, the carrier cannot by any act estop itself from demanding the lawful rate." All these cases, and others of a like tenor, are cited and approved in *Peanut Co. v. R. R., supra,* and *R. R. v. Latham, supra.* So that the

law on this question is finally settled and established that if the proper rate was not charged in this case, or less than the fixed rate was charged and received, the plaintiffs have the right to recover the amount of difference between the true and the false rate from the defendant.

In summing up, we may add that as the question in this case requires the construction of a written tariff rule of the Southern Railway Company, we must apply to its solution the invariable principle that the intention of the parties must govern and the meaning ascertained by finding what was meant by what was intended, and thus construed we deem it to be plain that Goldsboro was not regarded as an original point of shipment, and that defendant was not entitled to the lower rate, under the concentration and reshipment privilege.

We direct attention to original Rule 4 B, substituted for Rule 4 A (b), as designated in the record, which provides that "substitution of cotton brought in by boats or wagons, *or by rail from nontransit points,* for cotton brought in on transit rates will not be permitted," and to the principle as stated by the Court in *Chic. Milw. & St. Paul Rwy. Co. v. State of Iowa, supra,* that the nature of the shipment must be determined by the essential character of the same, and not by the billing or rebilling, or by mere forms of contract. This case, in several respects, is clearly distinguishable from the one cited, and we are here dealing with quite a different question, and not only with the distinction between interstate and intrastate commerce, for where the former is not materially or injuriously affected, the courts lean towards the view that the commerce is intrastate, as we held in the *Selma Station case,* decided at this term, the latter case being strongly supported by *C. M. and St. Paul Rwy. v. Iowa, supra.*

We have found a case decided by the Interstate Commerce Commission upon facts somewhat similar to those in this one, where the commission held, and so decided, that the complainant, insisting upon the lower or concentration and reconsignment rate, upon facts, as to reconsignment, closely resembling those we have here, was not entitled to the reduction in rate because he had not actually taken possession of the goods at the designated place, so as to confer upon him the right of reconsignment to some other place beyond at the reduced rate. In order that the particular facts of that case and the decision of the commission may be clearly understood, we reproduce the same more extensively, as follows: "Two carloads of butter were shipped by complainant from Wellington, Ohio, and consigned to itself at Chicago. The local rate from Wellington to Chicago was 35 cents, and from Chicago to Evansville, 71 cents. Upon the arrival of the first car at Chicago, complainant sent a check for the freight at 35 cents, Wellington to Chicago. It was informed by defendant of an icing charge and was told that the entire

charges might be paid at Evansville, to which arrangement complainant agreed, and reconsigned the car to Evansville. Upon the arrival of the second car at Chicago, complainant merely reconsigned it to Evansville. The through rate of 71 cents was assessed on both cars. Reparation was claimed on the basis of 65.8 cents, the combination rate: *Held*, while a shipper had the right to consign a shipment to a given point, pay charges upon it, assume custody and take possession of the property, and later reship it to another point under rates lawfully applicable to such shipment, complainant was not entitled to reparation on the basis of the combination rate, since it did not reduce the property to its possession at Chicago," citing *Wood Butter Co. v. C. C. C. and St. L. Ry.*, 16 Interstate Commerce Cases, pp. 374-375.

The case of *R. R. v. Settle*, Supreme Court Reporter (Adv. Sheets), vol. 43, No. 2, pp. 2831, while not "on all fours" with this case as to the facts, bears a sufficient resemblance to it generally and substantially as to be controlling in principle. A careful reading of that case will disclose a strong trend of judicial opinion, including the view of the highest Federal Court, adverse to defendant's contention in this case. *Justice Brandeis* there says: "In other words, Madisonville was at all times the destination of the cars, Oakley was to be merely an intermediate stopping place, and the original intention persisted in was carried out. That the interstate journey might end at Oakley was never more than a possibility. Under these circumstances, the intention as it was carried out determined, as matter of law, the essential nature of the movement, and hence that the movement through to Madisonville was an interstate shipment; for neither through billing, uninterrupted movement, continuous possession by the carrier, nor unbroken bulk is an essential of a through interstate shipment. These are common incidents of a through shipment, and when the intention with which a shipment was made is in issue, the presence or absence of one or all of these incidents may be important evidence bearing upon that question. But where it is admitted that the shipment made to the ultimate destination has at all times been intended, these incidents are without legal significance as bearing on the character of the traffic. For instance, in many cases involving transit or reconsignment privileges in blanket territory, most or all of these incidents are absent, and yet through interstate tariffs apply. See *R. R. v. Harold*, 241 U. S., 371; *R. R. v. United States*, 245 U. S., 136; *R. R. v. United States*, 257 U. S., 247; 42 Sup. Ct., 80; 66 L. Ed., ... Compare *R. R. v. Hancock*, 253 U. S., 284. Through rates are ordinarily made lower than the sum of the intermediate rates. This practice is justified, in part, on the ground that operating costs of a through movement are less than the aggregate costs of the two independent movements covering the same route. But there

may be traffic or commercial conditions which compel or justify giving exceptionally low rates to movements which are intermediate. The mere existence of such intermediate rates confers no right upon the shipper to use them in combination to defeat the applicable through rate. Here there had been published interstate rates for the transportation from the southern points to Madisonville. For such transportation the interstate rates to Madisonville were the only lawful rates. To permit the applicable through interstate rate to be defeated by use of a combination or intermediate rates would open wide the door to unjust discrimination, and it would unjustly deplete the revenues of the carrier. The sole question, therefore, which could arise in this case was whether the movement actually entered upon at point of origin, and persisted in, was transportation of the lumber to Madisonville. Before the decisions above referred to, it was commonly assumed that while a carrier, or one of its employees, might not act as a reconsigning agent for a shipper, in order to enable him to use a combination of lower intermediate rates, and thus avoid the higher charges incident to the through interstate movement, the shipper might so use the combination, provided he consigned the car to himself at the intermediate point, there paid the charges, took possession, and then reshipped the car on the local rate to its real destination. The distinction made was without basis in reason. To permit carriers' revenues from interstate rates to be depleted by such misuse of a combination of intermediate rates would be no less inconsistent with the provisions and purposes of the act to regulate commerce than to permit them to be used as a means of discrimination. And, since the decisions cited above were rendered, the principle there declared has been steadfastly applied by the Interstate Commerce Commission for the purpose of protecting revenues of railroads against such attacks. See, also, *McFadden v. R. R.*, 241 Fed., 562. The decision in *R. R. v. Texas,* 204 U. S., 403, relied upon by defendants in error, is entirely consistent with these later decisions of this Court, although some expressions in the opinion are not."

Looking at this transaction as it manifestly was intended to be, the shipment was one from Mt. Olive to the final destination, and the incidents of the journey relied on by the appellee corporation to convert it into one entitling it to a cheaper rate from Greensboro and to the contemplated and ultimate destination or end of the journey, are not sufficient to determine the true rate in its favor. They were nothing more, in substance if not in form, than devices planned and adopted for the single purpose, and with the illegal intent, to obtain the suggested advantage. To sustain that view would tend inevitably to encourage and make

successful unjust discrimination and rebating, something denounced as unlawful and as "being inconsistent with the Federal act to regulate commerce." The character of this movement was substantially and practically so continuous as to make it a through and unbroken carriage from Mt. Olive to the final destination of the goods, and therefore the regular rate applies. There can be no reasonable doubt as to the intention that the journey was intended from the start to be a continuous one from Mt. Olive to the final destination, with a stop-over at Greensboro in order to get the lower rate, and the stops at Goldsboro and Greensboro did not in law break this continuity. It is not pretended, and could not be, that defendants were present at Goldsboro to receive and reduce into their actual possession the cotton for any legitimate or authorized purpose. To hold that defendants were entitled to what they claimed would open the door wide to the evil practice which the law of Congress was intended to prohibit and prevent, and be a plain violation of the Interstate Commerce Act.

The argument and brief of the defendant's counsel were both able, learned, and interesting, but we cannot adopt the conclusion reached by them. This is not a theoretical question, but a practical one, and does not admit of hypothetical instances or artificial arguments or reasoning in the demonstration of it.

Goldsboro was not the original point of shipment within the meaning of the tariff, and the defendant must pay the difference between what is justly due under it, and what they have already paid, and judgment will be entered in the court below for the amount due as stipulated between the parties, which is the judgment that should have been rendered by the able and learned judge who presided at the trial. Let it be certified accordingly.

Reversed.

IN THE MATTER OF THE ADMINISTRATION OF THE ESTATE OF J. W. BROWN, DECEASED.

(Filed 2 May, 1923.)

1. Sales—Executor and Administrator—Private Sales—Clerks—Appeal—Superior Court—Discretion of Court—Public Sales.

Where the administratrix, the wife of the deceased, has petitioned the clerk of the court for a confirmation of a private sale of a restaurant belonging to the estate, to her two sons at a certain price, and others of the heirs at law object thereto on the ground that the restaurant was worth more than the price proposed, one of them offering more money therefor, and standing able, ready, and willing to pay the advanced price,

and contending that it would bring more at a public sale: *Held*, on appeal from the order of the clerk to the Superior Court, the entire matter was before the Superior Court judge, and he was authorized, upon sufficient affidavits or verified pleadings, to make such orders therein as would tend to make the restaurant bring its full value.

2. Appeal and Error — Courts — Orders—Judgments—Sales—Executors and Administrators—Presumptions.

On appeal to the Supreme Court from an order of the judge denying the petitioner's prayer for the confirmation of a private sale, as administratrix of her husband's estate, she had agreed to make to her two sons, under the objection of others of the heirs at law, the presumption is, nothing else appearing, that there was sufficient evidence before the judge to sustain his findings of fact upon which he had based his order; and in this case, *held*, there was evidence of record appearing from the verified pleadings and affidavits of respondent, sufficient to sustain his order that the property be advertised and sold at public outcry.

3. Same—Statutes.

The provisions of C. S., 69, allowing the personal representative in certain cases, upon application to the clerk and obtaining his order therefor, to expose certain personal property therein specified at private sale for the best obtainable price, and report the sale for confirmation, does not take away from the clerk, or judge on appeal, the sound discretionary powers of determining whether a public or private sale would best subserve the interest of the parties, or to authorize a private sale when in the discretion of the clerk or judge, as the case may be, it was to their best interest.

4. Judgments—Orders—Courts—Irrelevant Remarks.

An incidental and irrelevant statement made by the judge in ordering personal property of an estate in his sound discretion, to be sold at public auction, cannot affect the validity of his order.

APPEAL by administratrix from order of *Ray, J.*, 16 September, 1922, from MECKLENBURG.

J. W. Brown died intestate in Charlotte in July, 1921, leaving a restaurant and hotel business, known as Brown's Restaurant and Hotel, together with other property, and his widow, Eunice J. Brown, qualified as administratrix of the estate on 8 August, 1921, and has been conducting the restaurant through her two sons, E. H. and H. F. Brown, since that time. J. W. Brown left surviving him five sons, two daughters, and a widow, two of which sons were minors, and both of the daughters were married.

On 3 January, 1922, the widow and the five sons, including the two minors, and the two interested parties, E. H. and H. F. Brown, signed an agreement to sell privately to E. H. and H. F. Brown all of the property and assets known as Brown's Restaurant for a price of $16,000. This proposed sale was not assented to by either of the two daughters, their answer and the objections to the sale being set out in the record,

wherein they aver that the price is not a fair and reasonable price for the business, and that they verily believe that a greater price could be obtained. They offer as proof of the truth of this contention on their part the fact that when the clerk of the court announced his willingness to receive bids for the property it was advanced to above $21,000 by Mrs. Devereux, one of the daughters and one of the protestants and respondents.

Attention is called to the fact, however, that when the two named purchasers, Herman F. and Ernest H. Brown, and the two minors are eliminated, there leaves only the widow, whose mind, it is alleged by Mrs. Devereux, is completely dominated by Herman F. and Ernest H. Brown, and one other brother, Isham A. Brown, as consenting to the said sale.

The entire history of the transaction as set forth in the papers is urged by the respondent as sufficient justification for the finding by Judge Ray that "It is to the best interest of the estate that the said property be sold publicly after due advertisement." Judge Ray then ordered a public sale of the property to the highest bidder, after advertisement, and report of the sale to the court, as the best interest of the parties would thereby be subserved. The administratrix appealed.

Clarkson, Taliaferro & Clarkson for administratrix.
J. F. Flowers for petitioner.

WALKER, J., after stating the case: The entire matter was before the judge by the appeal, and his findings will be presumed to be based upon the evidence considered by him. We do not understand that the administratrix, the appellant in this case, contends that there was no evidence upon which the judge could base such a finding, and, as we understand, there is no exception taken to the finding upon the ground that there is no evidence to sustain it, but if so, it is not tenable. It will hardly be denied that, by the appeal of the respondent, Mrs. Devereux, from the clerk, the entire case was constituted before the judge, and he could "determine all matters in controversy," and make all necessary and proper orders and decrees thereon. C. S., 637.

Of course the court would order that this property be sold in such a way that it would bring the most money, and Judge Ray was certainly justified in finding that it is to the best interest of the estate to sell the property publicly when the offer of $20,210 had been made, and, as the person making that bid was ready and willing to pay the price, or secure the same, the estate could not possibly be harmed by the order requiring the property to be sold at public auction, for the reason that the amount offered and bid for it would certainly be obtained, and the judge was

evidently convinced by proof before him that a great deal more would be received if the sale was public.

The petition of Mrs. Mable Brown Devereux, which appears in the record, states:

1. That this affiant made several bids for the property described, as appears from the record herein, and she was then and is now willing to pay more than the sum offered by the said E. H. and H. F. Brown, and, independently of herself as a prospective purchaser, she is informed and believes that the property is worth very much more than the price offered by E. H. and H. F. Brown, and that, if sold publicly, it will bring a fair price, and one much higher than had been offered by E. H. and H. F. Brown.

2. That she is convinced a much higher price could be obtained if the property is sold publicly, and she also alleges that the object of the administratrix in undertaking to suppress a public sale and thereby to avoid publicity is prompted by a desire to sell the property to her two sons, and, if necessary, for much less than its real value.

The allegation of Mrs. Devereux is not denied, but if so, there is enough evidence in support of it to justify the disposition of the case by Judge Ray, which will hereinafter more fully appear. In January, 1922, the administratrix urged the clerk to authorize a consummation of the proposed sale to her two sons at the price of $16,000. When she was not permitted to do so, the price was advanced by them, without advertisement, and without the public generally knowing that this valuable property was for sale, until more than $20,000 had been offered by Mrs. Devereux, who was ready, able, and willing to purchase the property, and she alleged that other persons were ready, able, and willing to purchase the same, and she believed that a much higher price could be had for the property if it were advertised, and if the public generally, and persons interested in business of this kind, were notified that the same was for sale, than if the sale were to be conducted in secret, or without letting the public know of it. This allegation does not seem to be categorically or, at least, sufficiently denied. With all of the parties and the evidence and record before the court, Judge Ray took this view of the matter and found that, even in view of the offer of E. H. and H. F. Brown of $20,210, to which they had increased the bid for the property, it was to the best interest of the estate and the parties that the property be sold publicly.

The allegations in the petition and answer of Mrs. Devereux, set out in the record, have not been denied, or sufficiently so, and, being duly verified, support the findings of Judge Ray that the best interests of the estate demand a public sale. There is additional evidence in the record,

however, that tends to sustain the contention of Mrs. Devereux and the finding of Judge Ray.

In 1919 the Legislature passed an act (Public Laws 1919, ch. 66), which is now C. S., 69, which allows the personal representative in certain cases, upon application to the clerk of the Superior Court, and obtaining an order therefor, to expose certain personal property therein specified at private sale for the best price that can be obtained, and to report the sale, when made by him, to the clerk for confirmation, and permitting an increase in the bids for the same.

It would seem that this statute was only permissive in character, and not mandatory upon the clerk or the judge having jurisdiction of the cause. It could scarcely have been the intention of the Legislature to take away the sound discretion of the clerk, or judge, in determining whether a public or a private sale would best subserve the interests of the several parties, but the intention and main purpose of the act were to authorize a private sale when it was found to be best. It was said by the Court (through *Judge Daniel*), in regard to what is now C. S., 68, as to the sale of "personal estate" at public vendue: "The executor or administrator might, before the passage of the act, have sold bona fide the goods and chattels of the testator or intestate. The legal title was in him, and an honest purchaser from him would always have acquired a good title. The common law on this subject is not repealed by this act. The statute is only directory, which, however, it would be well always to follow, for if the executor or administrator fails to obtain as much at private sale as would have been got at public vendue, he or they would be bound to make good the deficiency out of their own pockets." *Wynns v. Alexander,* 22 N. C., 59, citing *Cannon v. Jenkins,* 16 N. C. (1 Dev. Eq.), 427. We would not be warranted in holding that so radical a change in the law, as contended, was contemplated by the act of 1919, ch. 66.

As the judge had acquired a general jurisdiction of the case by the appeal, it must follow that he had the power to modify, or even to reverse, the ruling of the clerk and order a public sale of the property.

The mere incidental statement of the judge in making his ruling that a leasehold was real estate was a clear inadvertence on his part—a palpable slip of the tongue, which does not affect the merits of the controversy. We therefore pass it by as not requiring any further consideration from us.

What we have said is all that is necessary to decide the case, and we forbear any further discussion of it.

The judge was in the rightful exercise of his jurisdiction when he made the order for a public sale, there being plenty of evidence to support it.

The object of the law is to obtain the highest and best price, and that is its chief concern. *Justice Ashe,* in *Attorney-General v. Navigation Co.,* 86 N. C., at p. 412, citing and quoting from Daniel on Ch. Pr., 1465, says: "We find the English rule laid down as follows: 'When estates are sold before a master under the decree of a court of equity, the court considers itself to have greater power over the contract than it would have were the contract made between party and party; and as the chief aim of the court is to obtain as great a price for the estate as can possibly be got, it is in the habit, after the estate has been sold, of "opening the biddings," that is, of allowing a person to offer a larger price than the estate was originally sold for, and, upon such offer being made, and a proportionate deposit paid in, of directing a resale of the property.' And again, on page 1466 of the same book (Daniel, Ch. Pr.), it is said: 'That the mere advance of price, if the report of the purchaser being the last bidder is not absolutely confirmed, is sufficient to open the biddings, and that they may be opened more than once.'" And he adopts what was said by *Justice Rodman* in *Blue v. Blue,* 79 N. C., 69, as follows: "We think the correct rule is in accordance, so far as our information extends, with the uniform practice which has obtained in our courts in such cases. *Judge Rodman* says 'the practice in this State is to set aside a sale before confirmation, upon an offer of an advance of 10 per cent upon the price. That, also, is the English rule,'" citing *Ex parte Bost,* 56 N. C., 482; *Wood v. Parker,* 63 N. C., 379.

The cause was ably and learnedly argued here by Mr. Taliaferro for the respondent, but we think that we have correctly stated the controlling principle of the law.

Affirmed.

W. L. ODEN ET AL. V. J. D. BELL ET AL.

(Filed 9 May, 1923.)

Drainage Districts—Statutes—Bonds.

Proceedings for the establishment of a drainage district, C. S., 5312 *et seq.*, and bonds to be issued therefor, will not be held as defective because further steps were not taken for several years after they had been commenced, the court holding they were still pending, and because of the fact that the engineer and viewers did not file a profile map showing the surface of the ground, bottom grades, etc., at the time of the final report, C. S., 5327, it appearing that this was later done upon order of the board of drainage commissioners, and otherwise the provisions of the statutes had been strictly followed.

APPEAL by M. C. Carr from *Connor, J.,* at April Term, 1923, of BEAUFORT.

Controversy without action, submitted on an agreed statement of facts, to determine the regularity of the proceedings by which Beaufort County Drainage District, No. 11, was established, and to ascertain the validity of certain bonds authorized by the board of drainage commissioners of said district.

From a judgment upholding the establishment of the district and sustaining the validity of the bonds, M. C. Carr excepted and appealed.

Lindsay C. Warren for appellant.
Small, MacLean & Rodman for appellees.

STACY, J. The proceedings by which the drainage district in question was ultimately established were duly commenced on 28 March, 1919, under Public Laws 1909, ch. 442, as amended, now C. S., 5312 *et seq.* Petition was filed before the clerk, accompanied by the requisite bond and summons duly issued and served.

For various reasons, no further steps were taken in the matter until 6 March, 1922, when a supplemental petition was filed, setting out the above facts in substance, naming additional landowners who had acquired land or become interested since the filing of the original petition, among them M. C. Carr, appellant herein, and at this time the court entered an order adjudging that the proceeding was still pending, and directing that such additional parties as were necessary and proper should be brought in by due process, etc.

On 19 July, 1922, the engineer and viewers theretofore appointed filed their final report, together with a map of the district, but failed to accompany said map with profiles showing the surface of the ground, the bottom or grade of the proposed improvement, and the number of cubic yards of excavation or fill in each mile or fraction thereof, as required by C. S., 5327. This report was accepted as in due form, and notice was given that on 10 August, 1922, a hearing would be held on said report, at which time the court entered an order confirming the report, and directed that an election of drainage commissioners be held, which was done, resulting in the election of the defendants. From this order there was no appeal, as allowed by C. S., 5333. After due organization, on 22 September, 1922, the board gave notice of a bond issue as authorized and required by C. S., 5352.

On 26 March, 1923, the board of drainage commissioners authorized and directed the engineer and viewers to prepare and file with their final report the profiles as required by C. S., 5327, and this was approved by order of court.

Upon the foregoing facts appellant contends that the drainage district has not been legally established, and that the drainage commissioners

have no authority to issue the bonds in question. His Honor below was of the opinion, and so held, that the drainage district had been duly established, and that the board of drainage commissioners was fully authorized to proceed with its duties, including the delivery of the bonds in question, which have already been sold. We approve of this judgment. *In re Drainage District,* 175 N. C., 270, and cases there cited. After a careful examination of the record, no exception has been discovered which we apprehend should be held for reversible error, and hence the judgment will be affirmed in its entirety.

Affirmed.

J. MATH ARMSTRONG ET AL. v. THE BOARD OF COMMISSIONERS OF GASTON COUNTY.

(Filed 9 May, 1923.)

1. Constitutional Law—Health—Local Laws.

An act authorizing a certain county to erect a tuberculosis hospital and issue bonds therefor, and provide a tax of eight cents on the $100 valuation of its property for its maintenance, upon the approval of the voters, is both a special and local act and void under our Constitution, Art. II, sec. 2, prohibiting laws of this character appertaining to "health," "sanitation," etc.

2. Same—Hospitals—Tuberculosis—Elections—Ballots—Statutes.

Where the county commissioners have proceeded under a special local act to submit to its electorate the question of erecting and maintaining a tuberculosis hospital, to issue $150,000 in bonds therefor, and levy an additional tax of eight cents on the $100 valuation of its property for maintenance, their action thus taken cannot be sustained under the provisions of the general law, C. S., ch. 119, secs. 7279 *et seq.*, authorizing an expenditure for the purpose of not exceeding $100,000, and a maintenance tax not to exceed five cents, the balloting also under the general law differing from that in the special act in requiring separate ballots to be taken in two boxes instead of one. *Proctor v. Comrs.*, 182 N. C., 56 cited and distinguished.

3. Same—Bonds—Taxation.

A special or local act authorizing a county to maintain a tuberculosis hospital being contrary to the provisions of our Constitution, Art. II, sec. 2, its further provisions as to issuing the bonds for its erection and the levy of a special tax for its maintenance, are likewise void.

4. Statutes—Interpretation—Conflict—Exceptions.

Statutes upon the same subject-matter should be construed together, so as to harmonize different portions apparently in conflict, and to give to each and every part some significance if this can be done by a fair and reasonable interpretation; and where there is a general intent expressed in the statute and a particular intent incompatible therewith, the particular intent is to be considered in the nature of an exception.

5. Same—Health—Hospitals—Tuberculosis.

C. S., 7075, appearing in ch. 118, authorizing county commissioners to levy a special tax to be expended under the committee composed of the chairman of the board of county commissioners, the county health officer or county physician "for the preservation of public health," should be construed in connection with the sections of the following ch. 119, as to the maintenance of permanent public hospitals, and requires that the question of establishing such hospitals, as in this case for a county tuberculosis hospital, shall have the approval of the voters of the county in accordance to the methods and in the manner specified by the statute.

6. Constitutional Law—Statutes—Local Laws—Hospitals—Tuberculosis—County Expenses—Necessaries—Bonds—Taxation.

While Article II, section 2, of our Constitution has been held not to withdraw from the Legislature power by special legislation to authorize counties, etc., to provide proper revenue for advancing proper governmental purposes, though local in character, the decisions refer to legislation providing proper revenue for recognized and established objects, such as roads, bridges, and the like, and not to those prohibited by our organic law, as where the county under a special local act seeks to establish and maintain a tuberculosis hospital, which is not a necessary county expense; and the legislation being unconstitutional as to its dominent purpose, that part providing for the issuance of bonds and a levy of tax for this purpose is also invalid.

APPEAL by defendants from *Long, J.*, at April Term, 1923, of GASTON.

Civil action to set aside and annul an election held in said county of Gaston by order of defendants under Public-Local Laws of Extra Session 1920, ch. 112, on the question of the erection of a tuberculosis hospital in and for the county of Gaston, and to restrain any and all further proceedings under and pursuant to said election, especially the issuance as contemplated and proposed of county bonds in the sum of $150,000, and a tax of eight cents on the $100 valuation of property for maintenance of same.

For the purpose of this hearing, the demurrer admits, among other pertinent facts alleged in the complaint:

1. That in holding said election the defendants proceeded entirely under said Public-Local Laws of Extra Session 1920, ch. 112.

2. That at said election the measure was approved by a majority of the qualified voters, as indicated by the new registration required by the statute.

3. That as a result the defendants are about to issue and sell $150,000 of county bonds and levy a tax to pay the interest thereon and principal at maturity.

4. To levy a tax not to exceed eight cents on the $100 value for maintenance of said hospital.

5. That outside of the revenue to be raised by the tax complained of, all the revenue the defendant board can raise by taxation under the

constitutional limits is required to pay the necessary expenses of the county.

6. That in conducting said election there was one box and only two ballots reading as follows:

(1) For bonds for tuberculosis hospital, and for levy of tax for support of same.

(2) Against bonds for tuberculosis hospital, and for levy of tax for support of same.

There was judgment overruling the demurrer, and defendants excepted and appealed.

F. M. Redd and John M. Robinson for plaintiffs.
Mangum & Denny for defendants.

HOKE, J. Our Constitution, Art. II, sec. 29, prohibits the enactment of any local, private, or special statute concerning various specified subjects, including, among others, laws appertaining to "health, sanitation, or the abatement of nuisances," and declares that any local, private, or special act or resolution in violation of this provision shall be void. The statute under which the election was held in this case, Public-Local Laws of Extra Session of 1920, ch. 112, is, in our opinion, both local and special, coming directly within the constitutional inhibition, and in construing an act and proceedings subject to like limitations, we have held that the statute itself is void and the election and proposed bond issue under and dependent upon it should be annulled. *Robinson v. Comrs.*, 182 N. C., 590; *Woosley v. Comrs.*, 182 N. C., 429-433. It is contended for appellants that, although the special act should be declared void, authority is conferred upon defendants under the general laws to erect a hospital of this character, citing C. S., ch. 119, sec. 7279, etc. The statute referred to confers such authority, but as in the special statute, the same is dependent on approval of the popular vote to be taken under several subsequent sections, and a perusal of the general legislation will show that there are significant distinctions between the two statutes, both essential and formal. The special act allowing an expenditure of $150,000, as stated, and a maintenance tax not to exceed eight cents on the $100, and provided that the sense of the voters as to each proposition shall be taken on the same ballot and in a single box, whereas the general law provides for an expenditure not to exceed $100,000, with a maintenance tax not to exceed five cents, and that the proposition for construction and maintenance be taken on separate ballots and two boxes. It does not at all follow that because a voter has approved the larger expenditure he should be held to have approved the smaller, for he might well be of opinion that the latter amount is inade-

quate, and the defendants having elected to proceed entirely under the special act and the sense of the voters having been taken in accord with that act, the authority claimed must be restricted and referred to it, and when the same is found to be unconstitutional, all proceedings under it, as stated, must be declared invalid. *Proctor v. Comrs.*, 182 N. C., 56. And this ruling in no way conflicts with the decision in *Board of Education v. Comrs.*, 183 N. C., 300, for in that case, though a smaller amount under the general law was upheld, it appeared that the election had been called both under the general and special act, and was in all respects regular under the provisions of either law. It is further contended that power to proceed in this matter should be held to exist under and by virtue of a provision in the general statute, C. S., 7075, to the effect "That the board of county commissioners of each county is hereby authorized at any time to levy a special tax, to be expended under the direction of a committee composed of the chairman of the board of county commissioners and the county health officer or county physician for the preservation of public health." The section referred to here appears in C. S., ch. 118, art. 3, which provides generally for the organization of the county board of health, etc. In the next, chapter 119, as to the establishment and maintenance of permanent public hospitals, a kindred subject, the law, as has been seen, provides for a county tuberculosis hospital when the matter shall have been approved by a popular vote as therein prescribed. It is the recognized principle again and again applied in our decisions that "statutes upon the same subject-matter shall be construed together so as to harmonize different portions apparently in conflict, and to give to each and every part some significance, if this can be done by a fair and reasonable interpretation." *Perry v. Comrs.*, 183 N. C., 387-390; *Hicks v. Comrs.*, 183 N. C., 394; *Young v. Davis*, 182 N. C., 200; *Bramham v. Durham*, 171 N. C., 196; *Rankin v. Gaston*, 173 N. C., 683; *Cecil v. High Point*, 165 N. C., 431.

And again it is held that where there is a general intent expressed in the statute, and a particular intent incompatible with the former, the particular intent is to be considered in the nature of an exception. *Comrs. v. Aldermen*, 158 N. C., 191. A proper application of these principles will uphold and require the construction that while the board of county commissioners, under section 7075, are authorized generally to levy a special tax when required and necessary for the protection or conservation of the public health, before entering upon an expenditure for the erection and maintenance of a county tuberculosis hospital they must have the approval of a popular vote taken as the subsequent chapter provides. In connection with this position, we were cited by defendants to various decisions of this Court upholding the levy of municipal taxes,

and under statutes for the maintenance of undertakings more or less local in their nature, among others, *Martin County v. Trust Co.*, 178 N. C., 26; *Comrs. v. Trust Co.*, 178 N. C., 170; *Parvin v. Comrs.*, 177 N. C., 508; *Mills v. Comrs.*, 175 N. C., 215; *Brown v. Comrs.*, 173 N. C., 598. In these cases it was held, as contended, that the constitutional provisions did not and were not intended to prevent municipal authorities in the proper exercise of their governmental duties, from making provision by taxation for the support of measures they were fully authorized to undertake and carry on. So far as now recalled, they were all cases providing for necessary governmental expenses, such as roads, bridges, and the like, but here the purpose itself is in direct contravention of the amendment. The county commissioners have received no authority to enter upon the undertaking at all, and the proposed bond issue and tax levy being only an incident to an unauthorized and unlawful purpose, cannot be maintained. The distinction adverted to is stated in *Trustees v. Trust Co., supra,* as follows: "Again it is insisted that as the present act contains provisions for a bond issue, it should be upheld under the principle of *Brown v. Comrs.*, 173 N. C., 598; *Mills v. Comrs.*, 175 N. C., 215; that class of cases which hold that none of our recent amendments withdraws from the Legislature power by special legislation to authorize counties, cities, etc., to provide proper revenue for advancing proper governmental purposes though local in character. But those decisions refer to legislation providing proper revenue for recognized and established objects, such as roads, bridges, and the like, and the principle may by no means be extended to legislation providing revenue for a purpose prohibited by our organic law. Here the bond issue is to provide for the erection of buildings and maintenance of the graded school, that is its only purpose, and the establishment of the school being prevented because in violation of the constitutional inhibition, the bond issue necessarily fails with the principal and only purpose for which it was authorized." In answer to this position, appellants insist further that a hospital of this character should be considered a necessary expense, and so comes directly within the purview and effect of the cases cited, but we cannot so hold. Speaking to this question in *Keith v. Lockhart,* 171 N. C., 451: "The term may be said to involve and include the support of the aged and infirm, the laying out and repair of public highways, the construction of bridges, the maintenance of public peace, and the administration of public justice; expenses to enable the county to carry on the work for which it was organized and give a portion of the State's sovereignty." And the cases cited, *Keith v. Lockhart,* 171 N. C., 451; *Stephens v. Charlotte,* 172 N. C., 564-567; *Williams v. Comrs.,* 176 N. C., 554; *Sprague v. Comrs.,* 165 N. C., 603; *Hollowell v. Borden,* 148 N. C., 255, are in principle against defendants' position as to this being

a necessary municipal expense. A ruling that is further strengthened by the fact that the Legislature has thought it necessary to take the sense of the voters on the question before such a measure may be undertaken.

There is no error, and the judgment overruling the demurrer is

Affirmed.

OAKHURST LAND COMPANY ET AL. v. J. C. NEWELL.

(Filed 9 May, 1923.)

Trusts and Trustees—Resulting Trusts—Beneficial Interests—Purposes of Trust—Termination of Trust.

A land corporation conveyed certain of its lots to one who practically owned its stock, expressly to be held by him in trust for the care and support of his lunatic son, giving the trustee full power to convey the land and convert it into other property without accountability to any one, and to appoint a trustee to succeed him by his will, or, in his failure thereof, the court to appoint one: *Held*, the trustee acquired no vested right or interest beneficial to himself in the trust funds, and upon the death of the son in his father's lifetime, the purposes of the trust being then at an end, the title to the lots remaining, or not sold by the trustee, by the operation of law, resulted to the land company, and it may convey a valid title to a purchaser in fee simple.

APPEAL by defendant from *Long, J.*, at the April Term, 1923, of MECKLENBURG.

This is a controversy between plaintiffs and defendant, submitted without action, to determine whether the defendant will acquire a good and indefeasible title to land, which he had therefore agreed to purchase from Mrs. Ada Heath Montgomery and Dr. John C. Montgomery, her husband, and for which they had tendered to the defendant a good and sufficient deed of conveyance, in accordance with the contract, but which deed defendant refused to accept, alleging that they could not pass a good title thereto.

The following are the agreed facts upon which the submission is based:

It is not necessary to set out, in *haec verba*, the several deeds, or deeds of trust, mentioned in the case agreed, but it will suffice to set out only one or two clauses in each of the deeds. It is provided in Exhibit "I," Oakhurst Land Company to B. D. Heath, trustee, as follows: "The said B. D. Heath, trustee, is fully empowered and authorized to use, mortgage, sell, transfer, convey, or dispose of in any manner said lots of land at his own will and his own discretion without accounting for the proceeds from same; having all the powers, rights, and authority as set out in a certain paper-writing of even date with this deed, executed by B. D. Heath to B. D. Heath, trustee, for Harry M. Heath, which paper-writing is to be recorded in the office of the register of deeds for Mecklenburg County, to which reference is hereby made."

In Exhibit "I-A" is the following: "The said B. D. Heath shall have full power and authority to revoke this conveyance and render the same utterly and absolutely void, if at any time during his life he so desires.

"The said B. D. Heath, trustee, shall have power at any and all times to pledge, mortgage, sell, transfer, assign, and dispose of in any shape, form, or manner any part and all of said property set out in this conveyance, and shall not be required to account to the said Harry M. Heath, or his guardian, or any one else, for the proceeds from same, and shall not at any time be required to account for the profits, interest, or income from said property.

"The said B. D. Heath, trustee, shall have the power to exchange any of said property for other property, or substitute any other property therefor.

"The said B. D. Heath, trustee, shall have absolute and unlimited power, and authority unrestricted, in handling, using, selling, trading, transferring, and disposing of, in anywise, any and all of said property.

"If the said B. D. Heath fails during his life to appoint a trustee or guardian to take charge of and handle the said property which he shall leave in trust for the support, care, and maintenance of his said son, Harry M. Heath, then at the death of the said B. D. Heath, trustee, the clerk of the Superior Court of Mecklenburg County shall appoint some suitable and discreet person, who, after giving a sufficient bond approved by the said clerk, shall take charge of said property and shall hold the same in trust for the said Harry M. Heath."

After hearing and full deliberation, his Honor, Judge Long, delivered the following judgment upon the case agreed and the exhibits:

"This cause coming on to be heard before his Honor, B. F. Long, judge holding the courts for the Fourteenth Judicial District, upon the agreed statement of facts contained in this controversy without action, the court upon the construction of the deeds of trust and the will, copies of which are attached to the said submission, adjudges:

"(a) That the said trustee, having been given in and by said deeds of trust the absolute right to dispose of the property therein conveyed as and when he saw fit, and to altogether withhold from the said Harry M. Heath any income derived therefrom, the said Harry M. Heath consequently acquired no vested right, estate, or interest in said lands, or the income derived therefrom, and he having died prior to the death of the said B. D. Heath, the lands described in said deeds of trust either reverted to the Oakhurst Land Company, the original donor or grantor, or became absolutely vested in the said B. D. Heath, the trustee named in said deeds of trust:

"(b) That if the said Harry M. Heath took or acquired any right, estate, or interest in said lands, or the income derived therefrom, the

same absolutely terminated upon his death, as it appears that said deeds of trust were made for the purpose of securing to the said Harry M. Heath, who was hopelessly insane at the time they were executed, only a suitable support and maintenance therefrom, if his father, B. D. Heath, the trustee, in the exercise of the absolute power conferred upon him by said deeds of trust, should elect to use the income from said property for said purpose, as it is clear that it was not the intention of the donor to confer any right, interest, or estate in said lands upon the said Harry M. Heath—then hopelessly insane—which might be transmissible upon his death to his heirs at law.

"(c) That the said B. D. Heath by his last will and testament exercised the power conferred upon him by said deeds of trust to dispose of, and did dispose of, the lands therein described, or whatever interest he had therein.

"(d) That the wife and surviving children of the said B. D. Heath took whatever interest he, the said B. D. Heath, had in said lands subject to the limitations and conditions set forth in the various provisions of said will, just as they took and acquired the balance of the residuum of the estate of the said B. D. Heath.

"(e) That, as above stated, the wife and children of said testator acquired whatever interest he had in the said lands, subject to the conditions and limitations imposed upon the balance of the residuum of the estate in and by his said will.

"(f) That the said Harry M. Heath, having died before the death of his father, the trustee, (that fact) thereby terminated the object of said trusts, and the said trustee never having sold or otherwise disposed of the lands described in said deeds of trust, except in and by his last will and testament, the court is of the opinion that the estate in said lands reverted to the Oakhurst Land Company, the grantor of the plaintiff, Mrs. Ada H. Montgomery, and as it is admitted that the Oakhurst Land Company had a fee-simple title to said lands prior to the execution of the deeds of trust hereinbefore referred to, the court is further of the opinion that by its deed it conveyed a fee-simple title thereto to the said Mrs. Ada H. Montgomery, and that she can, therefore, convey a fee-simple title to the lands to the defendant J. C. Newell.

"It is therefore accordingly adjudged that the said J. C. Newell be ordered and directed to specifically perform his contract to pay for the lot of land first described in the agreed statement of facts upon a tender to him of a fee-simple warranty deed theretofore executed by the said Ada H. Montgomery and her husband, the coplaintiff, Dr. J. C. Montgomery."

From this judgment defendant appealed.

Cansler & Cansler for plaintiffs.
W. L. Marshall for defendant.

WALKER, J., after stating the case, delivered the following opinion for the Court: The judgment of the court as rendered by Judge B. F. Long is so clear, comprehensive, and conclusive, both as to the facts and the law applicable thereto, that it is hardly necessary to do much more than state it and adopt it as the opinion of this Court.

It may be well to refer as briefly as we can to that phase of resulting trusts to which the one under consideration belongs. Perry, in his excellent treatise on the Doctrine of Trusts (edition of 1899), p. 212, and secs. 159-160, says, at least substantially: If a trust for a specific purpose fails by the failure of the purpose, the property reverts to the donor or his heirs. If the gift is made upon a trust, and the trust is insufficiently or ineffectually declared, as, if it is too indefinite, vague, and uncertain to be carried into effect, it will result to the settler, his heirs, or representatives. Whether a trust is insufficiently declared or not depends of course upon the particular construction to be given to each individual deed or will; and so, whether a trust is too vague to be executed or not, depends upon the interpretation given to each instrument. If the declaration of trust is too imperfect to establish that purpose, and yet plainly shows that the intention was that the donee should not take beneficially, and that the sole purpose of the gift or grant was to carry out the purpose of the trust, which fails, the donee will take in trust for the donor or his heirs; but if it appear from the whole instrument that some beneficial interest was intended for the donee, or that he was intended to take beneficially in case the particular purpose fails, no trust will result, but he will take the estate discharged of all burdens. Where a gift is made upon trusts that are void, in whole or in part, for illegality, or that fail by lapse *or otherwise,* during the life of the donor, a trust will result to the donor, his heirs, or legal representatives, if the property is not otherwise disposed of. Thus, where the gift or trust is void by statute, as a disposition in favor of persons or objects prohibited from taking, or given at a time and in a manner forbidden, as in violation of the statutes of mortmain, or similar statutes, or where the gift contravenes some policy of the law, as tending to a perpetuity, or where it fails by the death of the beneficial donee or *cestui que trust,* a trust, to the extent of the estate given, will result to the donor, or his heirs, or legal representatives, if it is not otherwise disposed of. *Bond v. Moore,* 90 N. C., 239; *Ackroyd v. Simpson,* 1 Bro. Ch., 503; *Cox v. Parker,* 22 Beavan, 188; *Harker v. Reilly,* 4 Delw. Ch., 72.

We deem this elucidation of the question perfectly adequate and inclusive to illustrate this doctrine relating to voluntary conveyances, or wills, when the trust is not declared, but arises by operation of law, or where it is expressly, or by clear and manifest implication, declared, and in the latter the declared purpose of the trust fails or becomes impossible of execution or performance, and no beneficial interest is intended for the donee in trust. Sometimes the circumstances of a transaction are such that the person who takes the legal estate in property cannot also enjoy the beneficial interest, without necessarily violating some established principle of equity; the court will immediately raise a constructive trust, and fasten it upon the conscience of the legal owner, so as to convert him into a trustee for the parties, who in equity are entitled to the beneficial enjoyment. These constructive trusts may be separately considered under two distinct classes of cases: one where the acquisition of the legal estate is tainted with fraud either actual or equitable. And the other, where the trust depends upon some general equitable rule, independently of the existence of fraud. Hill on Trustees (Wharton's Ed. of 1854), top p. 197, star page 144. "There is one good general and infallible rule that goes to both kinds of trusts. It is such a general rule as never deceives; a general rule to which there is no exception; and that is this: the law never implies, the court never presumes a trust, but in case of absolute necessity. The reason of this rule is sacred; for if the chancery do once take liberty to construe a trust by implication of law, or to presume a trust unnecessarily, a way is opened for the Lord Chancellor to construe or presume any man in England out of his estate. And so at last every case in court will become *casus pro amico.*" (Per *Lord Nottingham,* in *Cook v. Fountain,* 3 Swans., 585.)

In this case, however, the trust, which was created by express agreement of the parties, clearly resulted to the donor or trustee, who was capable of taking it at the time, the Oakhurst Land Company, and its deed, passed the indefeasible fee it thus acquired, to Mrs. Ada H. Montgomery, whose deed, with joinder of her husband and proper acknowledgment by her and her husband, and her privy examination, when registered, will, under the agreement, pass it on to the purchaser (who is the defendant) from her.

But the appellee takes another position, which is, at least, plausible if not tenable. It is this, as he says: "If the deeds of trust in question created a resulting trust in favor of the Oakhurst Land Company, either before or after the death of Harry M. Heath, then its deed to the plaintiff, Mrs. Ada Heath Montgomery, dated 25 September, 1919, conveyed a fee-simple title to the lot of land contracted by her to be sold to the defendant, and she can, therefore, convey to him a fee-simple title thereto. It will be noted that section four of the agreed 'statement of

facts' recites that the Oakhurst Land Company conveyed to Mrs. Ada Heath Montgomery the land described in paragraph three of said statement, by its deed dated 25 September, 1918, pursuant to the orders and directions of B. D. Heath, who then owned the entire stock in said corporation. It therefore follows, if we are correct in the foregoing proposition as to the legal effect of the deeds of trust in question, that the Oakhurst Land Company had a fee-simple title to this land, on 25 September, 1918, when it conveyed the same to Mrs. Ada Heath Montgomery, and that she being seized in fee of said land by virtue of said deed, can convey a fee-simple title thereto to the defendant. If the deeds of trust in question did not create, by operation of law, a resulting trust in favor of the Oakhurst Land Company, then such deeds of trust created a fee-simple title to said lands in B. D. Heath, the trustee, which he had a right to dispose of by his will and testament.

This was expressly held by this Court in *St. James v. Bagley,* 138 N. C., 385, in an elaborate and well considered opinion by the Court, where it was held that a deed made by the grantors "to the vestry and wardens of St. James Church in the town of Wilmington for the purpose of aiding in the establishment of a home for indigent widows or orphans, or in the promotion of any other charitable or religious objects to which the property hereinafter conveyed may be appropriated by said parties of the second part," conveyed a fee-simple title (absolute) for said lands to the grantees, for the reason that no imperative trust was created by the language of the deed, and there appeared no intention on the part of the donors, or the deed itself, that the title should revert to them upon the termination of the uses and purposes for which it was conveyed.

In 1 Perry on Trusts (6 ed.), sec. 152, it is said: "But a distinction must be observed between a devise to a person for a particular purpose, with no intention of conferring upon him any beneficial interest, and a devise with a view of conferring the beneficial interest, but subject to a particular charge, wish, or desire. Thus, if a gift be made to one and his heirs, charged with the payment of debts, it is a gift for a particular purpose, but not for that purpose only; and if it is the intention to confer upon the donee of the legal estate a beneficial interest after the particular purpose is satisfied without exhausting the whole estate, the surplus goes to the donee and does not result. But if the gift is upon a trust to pay debts, that is a gift for a particular purpose and nothing more. If the whole estate is given for that one purpose, and that purpose does not exhaust the whole estate, the remainder reverts to the donee or his heirs. Or, as *Vice-Chancellor Wood* stated the rule: (1) Where there is a gift to one to enable him to do something, where he has a choice whether he will do it or not, then the gift is for his own benefit, the motive why it is

given to him being stated; (2) where you find the gift is for the general purposes of the will, then the person who takes the estate cannot take the surplus, after satisfying a trust, for his own benefit; (3) where a charge is created by the will, the devisee takes the surplus for his own benefit, and no trust is implied."

In this connection it must be borne in mind that B. D. Heath was in fact, though not in law, the owner of the land described in the deeds of trust; that in said deeds of trust an absolute right was conferred upon him, and reserved by him, to dispose of the property therein described, as and when and for such purposes as he might see fit. These facts might tend to show that the parties to the transaction intended to convey to him a fee-simple title to said property to do with it as he saw fit, subject to the stated charge thereon for the benefit of his afflicted son, in which event, of course, there could be no resulting trust to the donor, the Oakhurst Land Company, as no distinct and imperative trust would be imposed upon the gift, the said B. D. Heath would therefore have the right to dispose of said land at his will and pleasure. But in our case there was a distinct and imperative trust created and imposed upon the land, by the Oakhurst Land Company's deed to B. D. Heath, as trustee, which was that he would apply the income or profit thereof to the support and maintenance of his insane and helpless son who was, by reason of his unfortunate infirmity, unable to take care of himself. There was no discretion given him here, but the trust, and the object thereof, were clearly and definitely expressed in the deed creating it, and no one can say, with any show of reason, that the land was conveyed, or the trust created, for the individual benefit or advantage of B. D. Heath. It would therefore seem to be a clear case for a reverter to the donor, as the trust had wholly failed before the death of B. D. Heath. This could not be regarded as a mere charge upon the land for the benefit of the son, but must be considered as a well declared and specific trust.

It may well be added that in both deeds B. D. Heath is described "as trustee," and, in Exhibit "I-A," he is described as "trustee of Harry M. Heath," and in the latter it is expressly stated that his object was to make provision for the care and support of his son, Harry M. Heath, and by clear implication, not for himself, but merely in fulfillment of his filial duty. The large powers given him by the deed of trust relate to his manner and methods of selling, disposing of, or exchanging the land, or substituting other lands therefor, and the deed providing that he shall not in any manner answer to his son, Harry M. Heath, for the execution of his trust. The provision as to the appointment of another trustee, should B. D. Heath die before fully administering the trust, and his son Harry M. Heath should survive him, was inserted to prevent the failure of a trustee, by reason of his own death, to complete the full

execution of the trust. The specific requirement is that if B. D. Heath shall fail to appoint a trustee to take his place, in case of his death before completing the execution of his trust, then that some one be appointed for the purpose, but he clearly recognizes the fact that he is nothing more than a trustee for the specific purpose declared, for his son, and in no sense for himself. This, without other considerations, conclusively shows that there was no beneficial interest in B. D. Heath to prevent a reverter to the land company.

So it is argued and concluded that in any admissible view the title in the defendant will be a perfectly good one.

It would be useless to discuss the other questions raised by counsel.

We can find no error in the proceedings, or in the judgment, and we therefore approve and affirm the same.

Affirmed.

J. W. JACKSON AND WIFE v. EMMA KEARNS.

(Filed 9 May, 1923.)

1. Waters—Surface Waters—Diversion—Damages.

The upper proprietor has no right to collect the surface water on his own land and divert it from its natural flow, and discharge it upon the lands of the lower proprietor, to his damage.

2. Same—Easements—Judgments—Estoppel.

A judgment in a former action against the upper proprietor of lands for damages caused to the land and crops of the lower proprietor by the breaking in a freshet of a dam placed by the upper proprietor, without authority, washing holes in the land, does not create a permanent easement in the lands, or estop the lower proprietor in his action to recover damages caused by the breach in the dam from a later freshet by reason of the continuance of his unlawful act in not having repaired the dam since the former judgment.

3. Same—Tenants in Common.

A recovery by one tenant in common of damages to his undivided interest in the lands caused by the unlawful diversion of water by the upper proprietor on his own lands, does not estop the other tenant in common from recovering the damages he has also sustained by reason of the unlawful act.

APPEAL by plaintiffs from *Finley, J.*, at December Term, 1922, of RANDOLPH.

This was an action to recover damages for injury alleged to have accrued from a cross-dam or wall from the creek to the highlands maintained in a defective condition by the defendant on her lands on the east

side of Carraway Creek in Randolph County above and adjoining the lands of the plaintiffs. It was in evidence that when large freshets come, water is impounded by said wall and on account of breaches therein, the water is diverted through said breaches and washes away and injures the plaintiffs' land. The evidence for the plaintiffs was that during a big freshet in the creek in June, 1919, the plaintiffs' crops and land were damaged thereby to the extent of $1,250. There had been similar damage to the plaintiffs' land in 1913, and an action therefor in which the plaintiffs had recovered for the damages sustained thereby $500. The court held that plaintiffs could not recover in this action because permanent damages had been adjudged and assessed in the first action for the damages sustained from the freshet in 1913, and were therefore estopped to bring this action, and entered judgment accordingly, from which judgment the plaintiffs appealed.

Brittain & Brittain and J. A. Spence for plaintiffs.
H. M. Robins and Hammer & Moser for defendant.

CLARK, C. J. It is well settled in this State that the upper proprietor has no right to collect the water and divert it from its natural flow and discharge it upon the land of the lower proprietor. *Jenkins v. R. R.*, 110 N. C., 443, and citations thereto in Anno. Ed. The sole question presented in this case is whether the judge properly held that the judgment for damages in a former action sustained from the diversion of water in the freshet of 1913 whereby the plaintiff's land and crop were injured, was an estoppel upon the plaintiffs to maintain this action for the damages resulting in 1919 by the natural flow of the water being diverted through the breaches created by the freshet of 1913, which had remained unrepaired. That action was brought by J. W. Jackson alone. The present action is brought by J. W. Jackson and his wife, M. M. Jackson, it being shown that she is owner of a half interest in said land as tenant in common. It also appears from an examination of the complaint that the action instituted for the damages sustained by J. W. Jackson from the injury to his land caused by the breaking of defendant's dam in 1913 was the washing of a great hole in the defendant's land and washing off the soil from other parts of the land, and asked judgment for this damage, and that the defendant, the upper proprietor, should repair said breaches or tear down the wall so that the plaintiff's land would receive the natural flow of the water only. The breaches have not been repaired.

The plaintiff contends that it was not intended by that litigation to give the defendant therein an easement to maintain the wall nor to exempt the defendant from liability for this subsequent washing out of new holes and carrying away the soil by the freshet of 1919, or from all

subsequent freshets in which the impeding of the natural flow of the water by the defendant's dam could cause injury to the plaintiff's property. By reference to the judgment by default granted by Judge Justice at March Term, 1917, it was adjudged that "the defendant wrongfully and unlawfully permitted the dam holding said water to break and caused the water to pour over the plaintiff's land and damage the same by washing the soil and other parts of said land away and making holes therein." At July Term, 1918, the inquiry was instituted before Judge Long, and the issue submitted as above stated, "What damages is the plaintiff entitled to recover, permanent or otherwise, against the defendant for and on account of the maintenance of the dam, as alleged in the complaint?"

It is apparent from this that the damages alleged in the complaint as aforesaid were as recited in the judgment by default that the defendant had "wrongfully and unlawfully diverted the water from Carraway Creek, and wrongfully and unlawfully permitted the dam holding said water to break and cause the water to pour over the plaintiff's land and damage the same by washing the soil and other parts of said land away and make holes therein." The damages sought in that action were the permanent damages for washing away the soil and making the holes by the freshet of 1913 and cannot reasonably be construed to have been the permanent damages to the plaintiff's land by reason of its depreciation which was given if the judgment gave a permanent easement.

In short, the judgment of July, 1918, obtained upon the default judgment of 1917, was for the damages, permanent or otherwise, caused by the unlawful diversion of the water making holes and otherwise washing away the soil on the plaintiff's land. It did not create a permanent easement in favor of the defendant to maintain the dam and thereby forever possess the right to divert the water making other holes and washing off the soil of the plaintiff's land for all time to come.

It was stated on the argument here, and not denied, that the plaintiffs' land was worth from $200 to $300 an acre, and it is not reasonable to suppose that $500 was intended to cover the damages which would be sustained thereafter by the maintenance of the dam in future, especially when the cause of action in the former suit was for the diversion of the water by the dam and the failure to maintain it in good condition whereby breaches were made and the plaintiffs' land injured thereby in the manner stated.

The facts of this case are very similar to those in *Clark v. Guano Co.*, 144 N. C., 74. That case cites with approval, among many others, *Porter v. Durham,* 74 N. C., 767, as asserting the elementary principle that the owner of land cannot raise any barrier or dike even for the better enjoyment of his own property, so as to obstruct the natural

drainage of another's land or divert water thereon, and says, page 77, that the riparian owner "cannot set up a barrier to the flow of water in its natural or accustomed channel if it will result in injury to his neighbor."

In *Ridley v. R. R.*, 118 N. C., 996, it was held, probably for the first time in this State, that in an action against a railroad company which had constructed its road under lawful authority, not being a nuisance but a permanent right of way, the plaintiff or defendant could elect to have permanent damages assessed upon proper averment on the trial and proof thereof, and the subsequent statute, now C. S., 440, subsec. 2, so authorized the assessment for permanent damages in such cases. It was further held in *Ridley v. R. R., supra*, that where the plaintiff in an action against a railroad in such case had the damages apportioned without any allegation of prospective damages, the judgment would not be a bar to actions for future damages, and either party in such subsequent suits can demand that both present and prospective damages be assessed.

The assessment of permanent damages was made imperative by the statute, now C. S., 440, subsec. 2, but as to railroads only. *Barclift v. R. R.*, 175 N. C., 116. Whether it can be allowed in other cases is a matter fully discussed by *Walker, J.*, in *Barcliff v. R. R.*, 176 N. C., 41, where it is held that even where the plaintiff is not entitled to have the permanent damages assessed as a matter of right, if that question is clearly presented and passed on it will confer an easement. In *Webb v. Chemical Co.*, 170 N. C., 663, the Court held that, except in actions against railroads for damages caused by the right of way, permanent damages can be assessed as a right only "when the source of the injury is permanent in its nature, and will continue to be productive of injury independent of any subsequent wrongful act."

In the case at bar the damages obtained in the judgment by default in 1917, and the amount ascertained upon the inquiry in the trial in 1918, were not of such nature. They were not for the erection of a dam and injury sustained by the diversion of water caused thereby, for there was none alleged or shown, but the damages recovered were for failure to maintain the dam whereby through the breaches made therein the water had gouged out holes and washed away some of the surface soil. This cause of action was, in the language of the decision in *Webb v. Chemical Co., supra*, "not permanent in its nature, nor would continue to be productive of injury independent of any subsequent wrongful act."

The defendant, therefore, did not obtain, by reason of the former judgment, any easement to maintain the dam.

The defendant in that case could not have had permanent damages assessed as a matter of right and upon the pleading and the judgment it

is clear that no damages were assessed by reason of the erection of the dam itself, and the defendant has not acquired an easement to maintain such dam.

In addition, as already stated, only one of the tenants in common was a party to the former action. There was error in holding that the former action was an estoppel in this action for the damages sustained by the freshet of 1919, and there must be a

New trial.

J. E. BRADY v. ELMER AND A. C. MOTON.

(Filed 9 May, 1923.)

Vendor and Purchaser—Warranty—Breach—Verdict—Appeal and Error—Harmless Error.

Where an action upon a note given for a Holstein bull has been united with the purchaser's action for damages for breach of warranty in the sale of the bull, and the latter regarded as a counterclaim, the verdict of the jury, upon conflicting evidence and under a charge free from error, that there was no warranty by the plaintiff, renders immaterial defendant's exceptions referring only to the *quantum* of damages for the alleged breach of warranty.

APPEAL by defendant from *Finley, J.,* at the July Term, 1922, of RANDOLPH.

On perusal of the record, it appears that there was an action pending in Superior Court of said county, presumably on appeal from a justice's court, to recover on a $150 note given by defendants to plaintiff for the purchase price of a Holstein bull. The defendants had also sued plaintiff to recover damages to amount of $2,650 for breach of an express warranty in the sale of the bull. It having been also made to appear that the two actions grew out of the same transaction, and involved the same testimony from the same witnesses, an order was entered that they be consolidated and tried together and defendants' action treated as a counterclaim to plaintiff's suit. There was verdict and judgment for plaintiff, and defendants appealed.

C. H. Redding and J. A. Spence for plaintiff.
Hammer & Moser and Brittain, Brittain & Brittain for defendants.

HOKE, J. The action, as now presented in the record, is to recover on a note for $150 given by defendants to plaintiff for the purchase price of a Holstein bull, said amount being due and unpaid. Counterclaim by defendants for $2,650 as damages for an alleged breach of an express

warranty in the sale of the bull to the effect "that the bull was all right and a good and sure calf getter." On issues submitted, the jury rendered the following verdict:

"1. What amount, if any, is the plaintiff entitled to recover of the defendant? Answer: '$150, with interest.'

"2. Did the plaintiff warrant and represent that the bull in question was straight and all right and a good and sure calf getter? Answer: 'No.'

"3. Was the bull straight and all right and a good and sure calf getter? Answer:

"4. What damages, if any, is defendant entitled to recover of plaintiff on the counterclaim? Answer:"

Judgment for amount of the note, and defendants appealed.

There is no objection in the record affecting the verdict on the note given by defendants to plaintiff, and while the appellants have made numerous assignments of error as to the disposition of their counterclaim, some of them well worthy of consideration, they are all objections which refer only to the *quantum* of damages for the alleged breach of warranty, and as the jury, under a charge free from reversible error, have found that there was no warranty given, defendant's exceptions have become immaterial, and may not be allowed to affect the result. The judgment for plaintiff, therefore, must be affirmed.

No error.

IN RE ENTRY OF D. A. HURLEY.

(Filed 9 May, 1923.)

State's Land—Entry—Protest—Statutes—Disclaimer in Part—Judgments—Costs.

The protestants, under the provisions of C. S., 7557, claimed the original entry, C. S., 7554, was not for the State's vacant and unappropriated lands, but that they were the owners of the entire tract. After the evidence had been introduced, the protestant disclaimed ownership of half of the *locus in quo*. There was no reversible error in the judgment in protestant's favor. (*Nelson v. Lincker*, 172 N. C., 279); but *held*, the enterer was entitled to judgment declaring the remainder of the lands covered by the entry to be vacant and unappropriated, and for costs. C. S., 1241.

APPEAL by enterer from *Finley, J.*, at December Term, 1922, of RANDOLPH.

This was a proceeding of protest under the entry laws, C. S., 7557; and from a judgment in favor of protestants, the enterer, or claimant, appealed.

J. A. Spence for enterer.
Hammer & Moser and Brittain, Brittain & Brittain for protestants.

STACY, J. D. A. Hurley made entry to certain lands in Randolph County, under C. S., 7554, alleging the same to be vacant and unappropriated. Two separate protests were filed by the heirs of Ransom Lucas, under C. S., 7557, claiming title to each and every part of the lands covered by the entry. These protests were consolidated for the purpose of trial, and a survey of the lands was made under order of court.

On the hearing, and after the evidence was in, protestants orally entered a disclaimer to about one-half of the lands covered by the entry. Their evidence showed that they were the owners of the other part, and the jury so found. With respect to the judgment entered in favor of protestants for the land which the jury found was covered by the deeds under which they claim, we have found no reversible error (*Nelson v. Lineker,* 172 N. C., 279); but we think the enterer was entitled to judgment declaring the remainder of the lands covered by his entry to be vacant and unappropriated, and for costs. *Staley v. Staley,* 174 N. C., 640. The protestants did not enter a disclaimer to the undisputed part of the land until after claimant had gone to the trouble and expense of preparing for trial and having his witnesses in court. In fact, the disclaimer was not entered until after the evidence had been offered on the hearing. This was too late to save the costs, which, under C. S., 1241, the enterer is entitled to recover. *Swain v. Clemmons,* 175 N. C., 240; *Bryan v. Hodges,* 151 N. C., 413; *Moore v. Angel,* 116 N. C., 843. As thus modified, the judgment will be affirmed.

Modified and affirmed.

G. E. MIDYETTE, COMMISSIONER, v. LYCOMING TIMBER AND LUMBER COMPANY.

(Filed 16 May, 1923.)

1. Estates—Contingencies—Sales—Statutes.

The timber growing upon lands devised to the testator's named daughter for her sole and separate use during her life only, and at her death to such of her children and grandchildren then living as she may have appointed in her will, and upon her failure to have done so, to her children and grandchildren then living, during the life of the daughter, is affected by the contingencies contemplated by C. S., 1744, and amendments of 1923, authorizing a sale for the purpose of reinvestment, etc., upon compliance with its provisions, among other things requiring that those having a vested interest be made parties, the minors and those not in esse and

who cannot at present be ascertained be made parties by guardian duly appointed.

2. Same—Parties—Vested Interests.

Where such devisee and her living children and grandchildren have brought proceedings to have the timber on the lands affected with contingent interest sold for reinvestment, etc., C. S., 1744, and amendments of 1923, valid objection that no one having a vested interest in the lands had been made a party cannot be sustained. *Poole v. Thompson*, 179 N. C., 44.

3. Same—Bonds—Procedure.

Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bond for the preservation and proper application of the proceeds of sale, etc. (Laws 1919, ch. 259); but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree.

4. Same—Private Sales—Courts.

Where the provisions of C. S., 1744, and amendments of 1923, have been observed in the sale of lands affected with contingent interests, the commissioner appointed to make the sale may effect the same by private negotiations, subject to the approval of the court, when it is properly made to appear that the best interests of the parties so require.

CONTROVERSY without action, heard before *Daniels, J.*, holding courts in Northampton County, the judgment being signed out of term by consent of parties at Winton, N. C., on 26 April, 1923.

The action is brought to recover the purchase price of certain timber sold by plaintiff as court commissioner and bought by defendant at an agreed price of $6,720, on terms set out in court decree, said sale having been duly approved and title ordered to be made. Defendant having refused to pay price, plaintiff, as commissioner, by order of the clerk, was directed to institute proceedings to recover same, and on the facts submitted the court entered judgment that the defendant accept the deed and pay the price in amount and under terms as directed in the decree. Defendant excepted and appealed.

G. E. Midyette and Murray Allen for plaintiff.
George C. Green for defendant.

HOKE, J. It is submitted in the case agreed, among other things, that: "In a proceeding lately brought before the clerk of the Superior Court of Northampton County by Margaret B. Ellis, John H. Fitzhugh, and India W. Fitzhugh, his wife, W. T. Davis and Margaret E. Davis, his wife, against Andrew Fitzhugh and others, it was sought to sell certain standing timber standing on certain lands in said county, which

were devised in item 3 of the will of J. J. Bell, said item 3 reading as follows: 'I give, devise, and bequeath to my daughter, Maggie, or Margaret, Fitzhugh (who was one of the plaintiffs in the above proceeding), during her life, the tract of land and house where she now resides in Garysburg, N. C., together with one-half of the tract of land known as my homestead tract mentioned in item second of this will, to have and to hold the said land and house and other buildings where she now resides in Garysburg, together with one-half in acreage, but not in value, of the tract of land known as my homestead tract, unto her the said Margaret Fitzhugh's sole and separate use during her life only, and after her death, to such of her children and grandchildren living at her death as she may by her will appoint, and in case she shall make no such appointment by will, then to her children and grandchildren living at her death in equal portions, but such children shall take *per stirpes* and not *per capita.*'

"The above proceeding was brought for the purpose of selling to the defendant company certain timber standing on certain of the land included in the devise, for the purpose of reinvesting the funds arising from such sale as provided by C. S., 1744, and the amendment to the same passed at the session of 1923, entitled 'An act to amend section 1744 of the Consolidated Statutes, relative to the sale of contingent remainders,' which amendment gave the clerk of the court jurisdiction.

"In the proceeding brought before the clerk, the plaintiffs therein, above named, were Margaret Ellis, who is Maggie or Margaret Fitzhugh, named in item 3 of said will, and the other plaintiffs are all the children of the said Margaret Ellis, and the defendants in said proceeding are all her grandchildren.

"In said proceeding a guardian *ad litem* was appointed for the infant grandchildren *in esse,* and also for any grandchildren not *in esse,* whom the said Margaret Ellis might hereafter have. To the said proceeding all the children and grandchildren of the said Margaret Ellis, as well as the said Margaret Ellis and any unborn grandchildren of hers, were parties, and no question is raised in this appeal as to the regularity of the said proceeding. In said proceeding an order was made by the clerk of the Superior Court, approved by Hon. F. A. Daniels, judge, holding courts in the Third Judicial District, directing a sale of the said timber, and finding as a fact that it was deteriorating in value, and that a sale of the same would materially promote and enhance the interests of all the parties, and in said proceeding G. E. Midyette was appointed commissioner and directed to sell said timber, rights, and privileges to the defendant in this action, the Lycoming Timber and Lumber Company, and the said company agreed with the said commissioner to purchase the same, and thereafter refused to take a deed from said commis-

sioner for the same and comply with its terms of purchase, assigning as its reason that the said commissioner could not make a good and indefeasible title. The said commissioner made report of said facts to the court in said proceeding, and recommended the sale of said timber, and asked the court leave to bring action against the defendant company to compel it to purchase the said timber according to its contract, and the clerk of the court made an order which was approved by the Hon. F. A. Daniels, judge, now and then holding the courts of the Third Judicial District, empowering the said commissioner to bring this action against the said defendant company to compel the specific performance of its contract; and thereupon the plaintiff, G. E. Midyette, commissioner, and the defendant company submitted this controversy without action upon an agreed statement of facts which appear in the record. And the Hon. F. A. Daniels, judge, rendered judgment requiring the defendant to accept the deed tendered it for said timber, and to pay for the same, holding that a good and indefeasible title could be conveyed it by said commissioner, and the defendant excepted and appealed to this Court."

From this, a correct and very satisfactory statement of the pertinent facts submitted in brief of plaintiff's counsel, it appears that the land upon which this timber is growing, and of which under our decisions it is a part, is affected by a contingency by reason of the devise in remainder to the children and grandchildren of Margaret Fitzhugh living at her death, and so coming directly under the provisions of our statute, C. S., 1744, authorizing a sale for purposes of reinvestment. *Poole v. Thompson*, 183 N. C., 588-597; *Thompson v. Humphreys*, 179 N. C., 44; *Dawson v. Wood*, 177 N. C., 158; *Pendleton v. Williams*, 175 N. C., 248; *Latham v. Lumber Co.*, 139 N. C., 9.

It further appears that the proceedings under the statute, C. S., 1744, are in all respects regular, and in conformity with requirements of the same, and the amendment thereto made at the recent session of 1923, same being House Bill 197, Senate Bill 75, ratified 9 February, 1923. And this being true, there is no valid reason presented against the due enforcement of the contract of purchase.

The only objection suggested by defendant is that there is no one made a party who has a vested interest in the property, but this was directly held otherwise in the case of *Poole v. Thompson, supra.*

We consider it proper to say further that we fail to note in the record that any bond was given or required of the commissioner for the preservation and proper application of the proceeds of the sale. Such a bond is expressly required by an amendment to the statute, Laws of 1919, ch. 259, and should in no case be omitted. It is held, however, in the decisions cited that the omission does not ordinarily affect the title of the purchaser, and the same can and should be now supplied by an amended or supplemental decree.

Speaking to several of the questions similar to those presented in the present appeal, the Court, in *Pool v. Thompson, supra,* quoted with approval from *Dawson v. Wood, supra,* and *McLean v. Caldwell,* 178 N. C., 424, as follows: "In proceedings under the statute (Pell's Revisal, sec. 1590; C. S., 1744) to sell lands held in remainder, upon contingencies rendering the remaindermen incapable of present ascertainment, etc., the necessary parties defendant are those of the remaindermen who, on the happening of the contingency, would have an estate in the property at the time of action commenced, and those remotely interested to be represented and protected by a guardian *ad litem,* as the statute provides."

"Pell's Revisal, sec. 1590; C. S., 1744, providing for the sale of land affected with certain contingent interests does not in its terms or purpose profess or undertake to destroy the interests of the contingent remaindermen in the property, but only contemplates and provides for a change of investment, subject to the use of a reasonable portion of the amount for the improvement of the remainder, properly safeguarded, with reasonable provision for protecting the interest of the unascertained or more remote remaindermen by guardian *ad litem,* etc., and is constitutional and valid."

"And in the opinion in *McLean v. Caldwell, supra,* the Court said: 'From a perusal of these cases, and the authorities cited therein, it will clearly appear: (1) That on the facts presented the court had full power to order a sale for reinvestment under the statute; (2) that the same can be effected by private negotiations, subject to the approval of the court, when it is properly made to appear that the best interest of the parties so require. This was the course pursued and directly approved in *Dawson's case, supra;* (3) that ordinarily, and on the facts of this record, the purchaser is not charged with duty of looking after the proper disposition of the purchase money, but when he has paid his bid into court, or to the parties authorized to receive it by the court's decree, he is 'quit of further obligation concerning it.' "

We find no error in the proceedings, and the judgment for plaintiff is Affirmed.

PARKS-CRAMER COMPANY v. SOUTHERN EXPRESS COMPANY.

(Filed 16 May, 1923.)

Summons — Process — Attachment — Corporations — Shares of Stock— Courts—Jurisdiction—Statutes.

Where a nonresident express company doing business in this State, and having property herein, incurred a liability to its shipper for breach of its contract for the transportation and delivery of a shipment, and afterwards became absorbed in another nonresident corporation carrying on the same business with the same property and stock of the selling (debtor) company in the one continuing to do business here is subject to attachment under the provisions of our statute, C. S., 816, 817, 819 *et seq.*, where the cause of action arose here; and the fact that the certificates of stock are not physically in the jurisdiction of the courts of this State is immaterial.

STACY, J., dissenting.

APPEAL by defendant from *Ray, J.*, at September Term, 1922, of MECKLENBURG.

This was an action to recover $70 damages for breach of contract in the transportation and delivery of an express shipment from Philadelphia, Pa., to Charlotte, N. C., commenced before J. W. Cobb, justice of the peace for Charlotte Township, by suing out a warrant of attachment against the property of the defendant in this State on which there was an order of publication of summons and notice of attachment which the constable delivered to the local agent of the American Railway Express Company. There was an agreement between counsel, filed in the record, that the defendant, the Southern Express Company, admits that it owns shares of stock of the par value of $1,600,000 in the American Railway Express Company, but none of the certificates representing said stock are present in this State. The defendant, through its counsel, entered a special appearance for the sole purpose of moving to dismiss the action for lack of jurisdiction upon the ground that there had been no legal service of process upon the defendant, and as a basis of his motion filed in court, an affidavit by its president to the effect that said defendant was a corporation in the State of Georgia, and is not incorporated under the laws of this State, and has had no officer, agent, or property within this State since prior to the institution of this action, and also filed an affidavit on the part of the American Railway Express Company to the effect that that company is a corporation organized under the laws of the State of Delaware, has its principal office there where its stock books are kept and is not incorporated in this State.

The court overruled the defendant's motion to dismiss for lack of jurisdiction, and the defendant excepted. The case was tried and judgment rendered by the justice of the peace against the defendant, who appealed to the Superior Court. In the latter court the defendant entered a special appearance, and again moved to dismiss for lack of jurisdiction.

The motion was denied, and the defendant excepted. Upon the trial there were sundry exceptions, as set out in the record. Verdict and judgment in favor of the plaintiff for $70, with interest from 2 October, 1917, and the costs. Appeal by defendant.

Hamilton C. Jones for plaintiff.
Cansler & Cansler for defendant.

CLARK, C. J. It appears in the evidence that the defendant Southern Express Company was engaged for a number of years in business in this State; that on 1 July, 1918, said company sold out its business here to the American Railway Express Company, the defendant prior to that time having incurred debts and liabilities in this State, among them, as the plaintiff alleges, $70, the amount sued for in this action for breach of contract in a transportation and safe delivery of certain thermometers shipped by the Philadelphia Thermometer Company to the Stuart W. Cramer Company in Charlotte.

Prior to the transfer of the property of said defendant Southern Express Company to the American Railway Express Company, the defendant was notified of plaintiff's claim, and prior to such sale by the defendant to the American Railway Express Company, and prior to the beginning of this action, the plaintiff Parks-Cramer Company purchased the business and claims of the Stuart W. Cramer Company, among them the cause of action in this suit. On 23 September, 1920, plaintiff brought this action under C. S., 816, 817, 818, and 819, attaching the stock of the Southern Express Company in the American Railway Express Company and serving the summons upon the agent of the latter company in the manner authorized by said sections. The defendant took no exception to the manner of service, but resisted the attachment upon the ground that the sections of the Consolidated Statutes above referred to did not authorize such attachment, and if it did attempt to do so, the Legislature of this State had no authority to so enact.

When the case was called for trial in the court of the justice of the peace, the defendant moved to dismiss upon that ground, which motion was overruled, and the plaintiff recovered judgment for $70, interest and costs. The defendant excepted and appealed. On appeal the defendant, again appearing specially, moved to dismiss upon the same ground, which was denied. Upon the trial there was a verdict and judgment in the same amount, and the defendant appealed.

The chief point contested is the right to attach shares of stock of a nonresident in any association or corporation, whether foreign or domestic, for the purpose of acquiring jurisdiction. The defendant company, which has been incorporated in Georgia but not in this State, admits

that it owns $1,600,000 of the capital stock of the American Railway Express Company, which, incorporated in Delaware, but not in this State, is doing business here.

C. S., 816, provides: *"All property liable to attachment.* The rights or shares of the defendant in the stock of any association or corporation with the interest and profits therein, and all other property in this State of the defendant, are liable to be attached, levied on and sold to satisfy the judgment and execution." C. S., 817, provides how an attachment shall be levied upon any rights, shares, or any debts or other property incapable of manual delivery to the sheriff shall be made, but as to this there is no contest in this action. In that section it is provided: "Such service can be made in respect to a foreign corporation only when it has property within this State, or the cause of action arose, or the plaintiff resides in this State, or when the service can be made within the State preferably upon the president, treasurer, or secretary thereof." The plaintiff contends that the shares of stock of the defendant company in the American Railway Express Company are property within this State, though the certificates are not physically here, and further, that the cause of action arose here, and that plaintiff resides in this State. C. S., 818, is only as to certificate of defendant's interest to be furnished to the sheriff which is not contested here; and C. S., 819, is as to the mode of proceeding against garnishee, as to which also there is no contest.

The real point in controversy is whether shares of stock owned by the Southern Express Company, a nonresident corporation, in the American Railway Express Company, doing business here, is property which can be attached in this State as the basis of jurisdiction in an action by the plaintiff, a resident here, for a cause of action which arose here, when the certificates of stock are not physically in this State.

The intention of the Legislature, as clearly expressed, C. S., 799 (2), was to authorize the attachment of stock in foreign corporations, and also in the case of individuals or domestic corporations which are removing their property from the State with the intent to defraud creditors or doing any other act for which attachment would lie, and to authorize the attachment of stock in domestic corporations also. It seems to us that C. S., 816, means that, as it clearly says: "The rights or shares of the defendant's stock in any corporation or association are liable to be attached." That is, in the present case the shares of the Southern Express Company in the American Railway Express Company are subject to attachment, and have been legally attached in this case, and the court has thereby acquired jurisdiction in favor of the plaintiff resident here of a cause of action against the defendant which arose in this State.

C. S., 816, covers this case where the stock in the American Railway Express Company was issued in exchange for assets of the Southern

Express Company, which were liable for payment of the plaintiff's debt before the transfer by the Southern Express Company of this and all other of its property here to the American Railway Express Company. The defendant, formerly doing business here, and having incurred the liability for which this action is brought, cannot avoid liability, therefore, by selling its assets here to another company and transferring to such other company its assets here in exchange for the stock issued to such debtor company by the American Railway Express Company.

The defendant relies chiefly upon *Evans v. Monot,* 57 N. C., 227, for its contention that shares of stock owned by nonresidents in a foreign corporation cannot be attached in an action in this State for the reason, if for no other, that that decision was rendered before the passage of C. S., 816-819, under which the attachment in this case was issued.

In *Evans v. Monot, supra,* the Court held that the stock of a nonresident in a North Carolina corporation could not be attached, but C. S., 816, enacts that it can be under our present statute. In *Cooper v. Securities Co.,* 122 N. C., 463, it was held that unpaid subscriptions of the resident stockholders to the capital stock of a foreign corporation is subject to attachment, although in *Evans v. Monot, supra,* prior to the present statute, had held that the stock of a nonresident in a North Carolina corporation could not be attached. In *Cooper v. Securities Co., supra,* it was held that under C. S., 218 (1), unpaid balances due a foreign corporation under subscriptions to stock by subscribers residing here is property of such corporation for the payments of its debts. The language of the Court is as follows: "This State, however, is one of those which holds that (under our statute, Code, 218 (1), and 363 *et seq.*) the indebtedness in the hands of the debtor may be attached."

It would seem further to be clear that the stock of the defendant Southern Express Company in the American Railway Express Company is property within this State, and, therefore, liable to attachment here.

The American Railway Express Company owns all the equipment, trucks, franchises, etc., formerly owned by the Southern Express Company in this State, and in many places is doing business in the same building. For this property the Southern Express Company received the stock which it now holds in the American Railway Express Company.

In the case relied on by the defendant, *Evans v. Monot, supra,* it was said: "A share of the stock of the corporation is a thing incorporeal—a mere right—which entitles its owner to participate in the general management of the concerns of the corporation by being a member; in the meetings of the stockholders to elect officers and do other acts of the kind; to demand and receive from the corporation a dividend of profits, whenever dividends are declared, and to demand and receive a portion of whatever may be on hand at its dissolution."

This right attaches to every part of the corporation property, and to every activity of the corporation, so the question of the physical presence or nonpresence of stock in North Carolina does not in any wise affect the rights and interest of the Southern Express Company in the American Railway Express Company, which is doing business in this State. The certificate of stock is nothing more than evidence of the interest held by the Southern Express Company in the American Railway Express Company, and as the appellant admits its ownership of such interest in the agreed statement of facts, the physical presence of the stock in North Carolina is unnecessary.

The defendant relies upon Laws 1921, ch. 94, which amends C. S., 817, by expressly providing that shares of stock held by a nonresident debtor in a resident corporation of this State may be attached, as an implied authority that if the stock is held in a foreign corporation doing business here it cannot be attached; but we do not think that that was the purpose or the effect of the act of 1921, which was intended simply to make it plainer that the stock of a nonresident in a North Carolina corporation could be attached under C. S., 817.

The defendant contends that the Legislature cannot grant the court power to attach property beyond the limits of this State. If it were true that stock owned by a nonresident is not attachable here, the act of 1921 just cited is ineffectual, for whether the stock attached is that of a domestic corporation of this State or a foreign corporation, in either event, if the owner is a nonresident, the certificates of stock would not be physically liable in this State.

The American Railway Express Company, in which the defendant owns stock, though not a North Carolina corporation, is permitted to do business in this State, and it must do so upon the conditions fixed by the Legislature. The American Railway Express Company is doing business in North Carolina, and is fixed with the knowledge that C. S., 816 and 817, authorize the attachment of the stock of the nonresident defendant.

In Rood on Attachments, 24, it is said: "Foreign corporations are liable to be charged as garnishees the same as domestic corporations without an express statute"; and here our statutes, C. S., 816 and 817, specifically authorize the attachment in this case.

It is well settled that shares of stock in a corporation may be attached by a garnishment process served upon such corporation. Shinn on Attachments and Garnishees, column 2, page 869.

In *Sexton v. Ins. Co.*, 132 N. C., 1, this Court held that the *situs* of corporate stock for the purpose of attachment is either the domicile of the creditor or debtor.

The defendant cites cases that the *situs* of the stock of corporations is either the domicile of the corporation in which the stock is held or the

domicile of the corporation owning the stock, but they are cases as to the *situs* of the stock for the purpose of taxation, and the authorities cited by the defendant seem conclusive of that proposition that the stock can be taxed either where the owner resides or where the corporation has its domicile, but the point now before us is the attachment of the property in this State as authorized by our statute, C. S., 816, 817, 818, and 819, which are explicit that this attachment will lie.

In *Harris v. Balk,* 198 U. S., 215, which was carried up by writ of error from this State, where a citizen of North Carolina owed money to another citizen of this State, and was garnisheed by a creditor of the man to whom he owed the money while such debtor was temporarily in Maryland, it was held that as under the laws of Maryland the garnishee could have been sued by his creditor in the courts of that State he was subject to garnishee process when served in that State, even though only there temporarily, no matter where the *situs* of the debt was originally. That decision was placed upon the ground which would seem conclusive of the jurisdiction in this case, to wit: that "attachment is the creature of the local law, and power over the person of the garnishee confers jurisdiction in the courts of the State where the writ issued." In the present case the American Railway Express Company, though incorporated in Delaware, was doing business in this State and subject to its jurisdiction. The shares of stock held by the defendant in that company was an obligation of the company doing business here due to its stockholder. It was the "property of the stockholder in the hands of the company doing business here."

Whether it be treated as a liability or obligation of the company issuing the stock, or as an interest which the defendant owns in that company and its assets here, it was the "property" of the defendant, and in either event it was subject to payment of the debts of the defendant stockholder.

In 2 R. C. L., 820, it is stated that shares of stock owned by a nonresident in a foreign corporation cannot be reached by process of attachment, although the officers of the corporation are within the State, and the business of the corporation is being carried on here, saying: "The *situs* of the stock for the purposes of attachment and execution is the domicile of the corporation, and that place only. And for this purpose a corporation is deemed to have but one legal residence, and that is within the State or sovereignty creating it, although by comity it may be allowed to do business through its officers or agents in other jurisdictions." For this statement there is cited only one authority, *Ireland v. Globe Milling Co.,* 19 R. I., 180.

But, as we have seen, under our statute, C. S., 816-819, and Laws 1921, ch. 94, shares of stock owned by a nonresident debtor are attachable here.

There are other exceptions which were taken during the trial on the merits, but they do not require discussion. The real question before us is that discussed above as to whether the stock of a nonresident of this State is a corporation doing business here, though not incorporated in this State, is the subject of attachment. After the fullest consideration, we think that in the trial below there was

No error.

STACY, J., dissenting.

MRS. N. M. WYATT, ADMINISTRATRIX, v. CAROLINA FELDSPAR COMPANY.

(Filed 16 May, 1923.)

Instructions—Requests—Appeal and Error.

The refusal of a correct prayer for instruction is not erroneous when by a change of phraseology the trial judge has substantially charged it in his own language without weakening its force.

APPEAL by defendant from *Bryson, J.*, at October Term, 1922, of YANCEY.

Civil action to recover damages for an alleged wrongful death. The usual issues of negligence, contributory negligence, and damages were submitted to the jury, and answered in favor of the plaintiff. From the judgment rendered the defendant appealed.

Watson, Hudgins, Watson & Fouts for plaintiff.

Charles Hutchins, Merrimon, Adams & Johnston, and Harkins & Van Winkle for defendant.

STACY, J. Plaintiff's intestate, an employee of the defendant, while engaged in the discharge of his duties, met his death by stepping on a transformer platform and coming in contact with a highly charged electric wire. The deceased was working on a shed two or three feet from the transformer platform and had asked Lee Hilliard, the foreman in charge of the work, to cut off the power so that he might continue his work in safety. This the foreman assured him would be done as soon as one more car was pulled in; but for some reason the foreman neglected to cut off the current. Defendant contends that plaintiff's intestate knew the current had not been cut off, for he could hear the noise of the running transformers, and that he stepped from the shed to the transformer platform in the face of open and obvious danger, and hence by his own carelessness brought on his death. Plaintiff replies to this by saying that the noise of the transformers had no meaning to the deceased, for it was not proposed that all the wires should be "killed" or cut off.

The exceptions chiefly relied on by the defendant are those relating to his Honor's refusal to give the jury certain special instructions, the principal one being as follows:

"If the jury shall find from the evidence that the plaintiff's intestate was employed to erect plates on a shed in defendant's mill, and you further find that there was a safe place to work and a safe way to and from his work had been given plaintiff, and he was warned not to go about the transformer, and if you further find plaintiff's intestate, instead of adopting the safe way of going from his work, stepped from the shed over and upon the transformer platform and was killed in consequence of so doing, then his own negligence was the proximate cause of the injury, and you should answer the second issue 'Yes.'"

The trial court marked on this request, "Refused except as given in the charge," and we find that the instruction was substantially given in the charge. The same may also be said of the other requests.

The presiding judge is not required to pursue the exact language of the prayers. He may choose his own words in stating the law arising upon the evidence, and if a proper instruction embodied in a prayer be given in substance and effect, without its force being materially weakened by reason of any change in the phraseology, it meets every requirement of the law, and is all that the party is entitled to ask. *Daniel v. Dixon,* 161 N. C., 377, and cases there cited.

After a careful perusal of the record, we have found no ruling or action on the part of the learned judge which we apprehend should be held for reversible error. This will be certified.

No error.

STATE EX REL. CORPORATION COMMISSION v. THE SOUTHERN RAILWAY COMPANY AND THE ATLANTIC COAST LINE RAILROAD COMPANY. THE SELMA STATION CASE.

(Filed 11 April, 1923.)

1. Corporation Commission—Railroads—Orders—Statutes—Appeal—Exceptions—Waiver.

Where, according to the statute applicable, the citizens of a town have petitioned the Corporation Commission to require two railroad companies to erect a union station at a junction, and after due hearing and investigation the commission has entered an order requiring the railroad companies to erect the station, from which no appeal was taken; and at the request of the companies based on conditions growing out of the World War, the commission has suspended the effect of its order for several years: *Held,* the order previously entered by the commission was one authorized by valid statutes (C. S., 1041, 1042), and complete and final

in its effect, requiring an exception entered within the statutory time to have the matter reviewed by the Court, and the action of the commission in suspending the time of the operating effect of the order, at the railroads' request, and in consideration of their financial condition under the circumstances, until such time as these conditions were found by it to have so changed as to make the order unoppressive, was not of such character as to give the railroad companies the statutory right of excepting and appealing from the date of its effectiveness, or relate back to the filing of the original order; and *held further*, under the facts of this appeal the railroad companies had waived their right to have the order reviewed by the Court.

2. Corporation Commission—Railroads—Statutes—Remedial Statutes.

C. S., 1041, 1042, conferring authority upon the Corporation Commission to compel railroad companies to erect stations upon a single line of road, and union stations at junctions etc., are of a remedial nature, and will be liberally construed by the courts in favor of the exercise of the authority conferred.

3. Railroads—Union Stations—Condemnation—Corporation Commission—Orders.

C. S., 1708, confers upon any railroad company the right to condemn land for the purpose of getting to a union depot required by the order of the Corporation Commission to be built.

4. Corporation Commission — Orders — Final Judgments—Mandamus—Railroads—Statutes.

Where the Corporation Commission has ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads have lost or waived their statutory right to appeal, such order is regarded as a final judgment, and mandamus proceedings to compel the enforcement of the final order upon failure of the railroads to except and appeal therefrom is the remedy authorized by the statute applicable. C. S., 1103.

5. Corporation Commission — Railroads—Statutes—Mandamus—Recordari—Actions—Consolidated Actions.

Where the Corporation Commission has ordered two railroad companies to build a union station at their junction, and upon the failure of the railroad companies to except and appeal to the courts under the requirement of the statute, the commission has afterwards refused to send up its record to the courts, and the railroad companies have applied to the Superior Court for a *recordari*, when proceedings for mandamus brought by the commission to enforce its order is therein pending: *Held*, the proceedings under the provisions of the statute should be entitled "State *ex rel.* Corporation Commission against the railroads so acting," etc., and the two causes may be consolidated or heard together on appeal to the Supreme Court, the decision of the one depending upon the decision of the other.

6. Corporation Commission — Courts — Records—Appeal—Exceptions—Statutes—Railroads.

The Corporation Commission is a court of record, C. S., 1023, and it must appear thereon that a railroad company claiming an extension of

time to file exception to the commission's order has done so, and no alleged parol agreement for an extension of time will be considered.

7. Corporation Commission—Railroads—Orders—Appeal—Notice of Appeal—Agreements.

The statutory notice of an appeal by a railroad company from an order of the Corporation Commission is mandatory and cannot be extended by the consent of the parties of record.

8. Commerce—Railroads—Intrastate Roads—Junctions—Stations—Statutes—Federal Transportation Act.

A leased railroad by a carrier wholly within the State is an intrastate road, nor can it be otherwise regarded because crossed by an interstate carrier at one of its intermediate stations with which it exchanges passengers and freight; and an order of the Corporation Commission that these railroads build a union depot at this junction required for the safety and convenience of the passengers comes within the police powers of the State so far as it relates to the intrastate carrier, and cannot be held as contrary to the provisions of the Federal Transportation Act, giving the Interstate Commerce Commission certain authority to regulate conditions at terminal points, etc., this act not including the building of stations, and expressly excepting from its provisions the right of the State, in the exercise of its police powers, to require intrastate railroads to erect depots upon their lines of road.

9. Same—Constitutional Law—Interstate Commerce.

The order of the Corporation Commission for the joint erection by an intrastate carrier and an interstate carrier of a union station at a junction cannot be regarded as objectionable so far as it relates to the intrastate carrier, as a burden on interstate commerce, when it appears that the commission was passing upon the petition of only a few cities or towns in the State separately and not as a part of a State-wide scheme, and the expenditures required were in amount too small to affect such commerce.

10. Statute — Interpretation—Prospective Effect—Federal Transportation Act.

The Federal Transportation or the "Esch-Cummings" Act is prospective in its enforcement, and cannot relate back to a final order of the State Corporation Commission not appealed from, for the erection of a union station where the lines of an intrastate and interstate carrier cross each other, the execution of which has been stayed by the commission until after the passage of the Federal statute solely for the advantage of the carriers at their request.

11. Statutes—Interpretation—Prospective Effect.

Retrospective laws are generally regarded as dangerous to liberty and private rights, and such effect will not be given them by the courts unless the Legislature has explicitly declared in proper instances its intention that they should so operate; or unless such intention appears by necessary implication from the nature and words of the act so clearly as to leave no room for a reasonable doubt on the subject.

12. Same—Legislative Committee Explanation—Amendments Offered and Rejected.

In construing the Federal Transportation Act in this case, consideration is given to the explanation of the chairman of the committee in Congress,

having the bill in charge, which had its effect in defeating an amendment that it apply to union depots at points that were not termini of the interstate carrier, such consideration being permissible under the opinions in several cases decided in the United States Supreme Court.

13. Commerce—Statutes—State Police Powers—Rights Reserved—Congressional Omission to Act.

Where Congress has refrained from regulating interstate commerce in certain particulars, such powers in these instances are reserved in the State in the exercise of its police power, and the State may reasonably require intrastate carriers to construct union depots along its line at junctional points with the line of an interstate carrier, especially when it will not interfere with interstate commerce, or when it is an aid to it.

14. Appeal and Error — Final Judgments — Corporation Commission—Mandamus—Cause Retained—Judgments.

It appearing on appeal from the record in this case that an alternate writ of mandamus allowing the defendants an opportunity to be heard before the issuance of the peremptory writ, from the Superior Court, would not have advantaged the appellant; final judgment is entered in the Supreme Court that a peremptory mandamus issue, that defendant comply with the order of the Corporation Commission and proceed to construct the station with reasonable diligence, retaining the cause for the present for such further orders and directions as in the opinion of the Supreme Court may be required.

HOKE, J., concurring; STACY, J., concurring in the concurring opinion.

APPEAL by Southern Railway Company from *Cranmer, J.*, 29 January, 1923, from WAKE.

On 11 September, 1914, the Corporation Commission of this State made an order requiring the Southern Railway Company and the Atlantic Coast Line Railroad Company to jointly construct and maintain a depot or station at Selma, North Carolina, for the use and accommodation of the public entitled to use the same and enjoy the facilities thereof. It appears, and is also admitted, that this order, the exact terms of which will hereafter appear, was not appealed from or in any way reversed or modified, though its enforcement, under the statute, was stayed or postponed, for the reason appearing in the record, and as a matter of favor to the respondents, the railroads, until its enforcement was required by the Corporation Commission when the reason for the stay no longer existed.

In order to clearly understand the successive steps taken in the course of this proceeding from and including 10 September, 1914, to the present time, it will be well to state, at least substantially, the proceedings in the matter as they will hereafter appear, and which are extracted from the record, pages 6 to 18, both inclusive.

BETTER DEPOT FACILITIES.

Town Officers and Citizens of Selma v. The Southern Railway Company and Atlantic Coast Line Railroad Company.

Ordered, that the Atlantic Coast Line Railroad Company and the Southern Railway Company proceed with the construction of a union passenger station at Selma, N. C., in accordance with plans submitted by the Atlantic Coast Line Railroad Company, 9 January, 1917, and substantially on the site of the present passenger depot at Selma, and that the construction of same be completed within six months from this date.

ORDER OVERRULING EXCEPTIONS.

In re Passenger Stations for Kinston, Selma, Newton, and Plymouth, N. C., Commissioner's Order of 11 April, 1922.

Upon consideration of the exceptions filed in the above cause by the Carolina and Northwestern Railway Company, as to Newton; the Southern Railway Company, as to Newton and Selma; the Atlantic Coast Line Railroad Company, as to Kinston and Plymouth, and the Norfolk Southern Railroad Company, as to Kinston and Plymouth, it is ordered that the exceptions in each case be and they are hereby overruled.

By order of the Commission, this 20 May, 1922.

R. O. SELF, *Clerk.*

IN RE UNION PASSENGER DEPOT.

Citizens of Selma, North Carolina, v. Atlantic Coast Line Railroad Company and Southern Railway Company.

By the Commission: Upon consideration of the record in this cause, we find that formal petition was filed with the Corporation Commission 1 July, 1913, alleging inadequacy of passenger depot accommodations maintained by Atlantic Coast Line Railroad Company and Southern Railway Company at Selma, N. C.; that after due notice to defendant railroad companies, formal hearing was held by the Corporation Commission at Selma, N. C., on 9 April, 1914, at which hearing both of the defendant railroad companies were represented by counsel, and that, based upon the evidence produced at said hearing, the Commission made its order of 10 September, 1914, directed to the Southern Railway Company and the Atlantic Coast Line Railroad Company, finding that the said passenger depot accommodations were inadequate, and ordering that the defendant railroad companies erect at Selma, at the junction point, a station adequate for their future needs, and that the plans for the proposed station be submitted to the Corporation Commission by 15 October,

1914, for its approval. Copies of said order were served upon each of the defendant railroad companies, and no exceptions to the said order were filed by either of them, but on 6 October, 1914, nine days before expiration of the term for filing the said plans, an officer of the Southern Railway Company appeared before the Corporation Commission and presented the extraordinary financial difficulties confronting the carriers at that time by reason of conditions produced by the European War, and presented the plea that because of such conditions the carriers be granted indulgence with respect to expenditures for improved facilities until such time as their financial conditions should improve. The following response was made to this plea for indulgence:

NORTH CAROLINA CORPORATION COMMISSION.

RALEIGH, N. C., 7 October, 1914.

DEAR SIR:—The Corporation Commission has given very careful consideration to your request, made on behalf of the Southern Railway Company, that this Commission extend to the company such consideration and leniency as it properly could during the continuance of the present depressed conditions, and especially that your company be relieved as far as possible from making improvements in facilities, stations, etc., until its greatly decreased earnings again become normal.

We are convinced from the full and frank statements made to us of your financial condition and your earnings for the last three months, which show increased losses from week to week, that the earnings of the company are not more than enough to meet its actual operation expenses, and that in order to do this the company will have to practice economy and retrenchment.

Under these circumstances it appears to us that it would be unreasonable, and not expected by the public, that you should be required to make improvements which could reasonably be postponed.

We therefore advise that until there is an improvement in conditions we will not require the company to make improvements in facilities, stations, etc., except where there is some peculiar necessity for immediate action.

In respect to applications for improved service and facilities pending before us, we will probably proceed to hear them and determine what improvements will be ultimately required so that the public may know what to expect, but these improvements will not be required to be made until there is an improvement in present conditions, except in cases of urgent necessity.

The foregoing letter was not in any sense a revocation of the order of 10 September, 1914, but merely a concession that further time would be permitted for its observance.

The indulgent policy of coöperation with the carriers indicated in this letter was continued until after the war period, when from time to time the matter of urgent need for better passenger depot accommodations at Selma was urged upon these defendant companies without adequate response, and on 2 March, 1922, notice was given each of these defendant companies that the matter of station facilities at Selma would be further heard. The Southern Railway Company was not represented at that hearing, and after the said hearing the Commission made its order of 11 April, 1922, reviewing conditions under which there had been delay in compliance with the Commission's order of 10 September, 1914, and an order was made that the Atlantic Coast Line Railroad Company and the Southern Railway Company proceed with the construction of the union passenger station at Selma in accordance with plans which have been submitted and approved, and that the construction of same be completed within six months from 11 April, 1922. No exception to this order was filed by the Atlantic Coast Line Railroad Company, and that company announced its readiness to proceed with its part of compliance with the said order.

The defendant Southern Railway Company did, on 8 May, 1922, file exceptions to the said order, which said exceptions were overruled, whereupon the Southern Railway Company filed notice of appeal, without bond for cost, and requested that the record and exceptions thereto be transmitted to the Superior Court, in term, of the county as authorized by law.

The said exceptions of the Southern Railway Company were overruled, and its application to have the record in this case certified on appeal has not been granted for that:

1. The said order of 11 April, 1922, was not an order affecting the legal rights of the Southern Railway Company, and was not, therefore, an order from which it would have a right of appeal. The legal obligation of these companies to construct an adequate passenger station at Selma became fixed under the order of 10 September, 1914, to which no exceptions were filed. The order of 11 April, 1922, imposed no additional obligation upon the Southern Railway Company, but merely ordered the defendant companies to construct a depot which they had been under legal obligations to construct since the order of 10 September, 1914.

2. The said exceptions to the order of 11 April, 1922, were not filed within ten days from the service of the said order as required by C. S., 1097, and were not filed until fourteen days after the expiration of said time, and no right of appeal could accrue to the Southern Railway Company by reason of said exceptions, even if the order of 11 April, 1922, had been an order affecting the legal rights of the Southern Railway Company.

3. No bond was filed by the Southern Railway Company with its notice of appeal to cover the costs of appeal.

4. The said exceptions of the Southern Railway Company were not only without legal effect, but the said exceptions presented no facts or conditions entitled to meritorious consideration, or that would have been entitled to meritorious consideration if they had been presented in apt time, as exceptions to the original order of 10 September, 1914.

Considering more particularly the several exceptions which, as we have held, can have no legal effect, we further conclude:

Numbers one and two: Exception that the order was issued without the defendant Southern Railway Company being given an opportunity to be heard, and exception that the defendant Southern Railway Company was not a party to the proceedings, are not supported by the facts in the case, as they appear in the record.

Number three: That the Southern Railway Company should not be required to participate in the cost of providing adequate depot facilities at Selma, since it has a contract with the Atlantic Coast Line Railroad Company to provide facilities at Selma for both lines on a rental basis. No such contract was proven, and could be given no consideration if proven, as the Southern Railway Company owes the obligation to the traveling public using its line to provide adequate accommodations for them, and it cannot by contract shift or evade this responsibility. If it has an enforceable contract with the Atlantic Coast Line to provide for it such facilities as are adequate for present necessity at Selma, it has had eight years since the order of the Corporation Commission of 10 September, 1914, in which to enforce such contract, and the courts remain open to it, but the Corporation Commission will not undertake to make the Atlantic Coast Line build depots for the use of the Southern Railway, and would have no legal authority to do so.

Number four: Exception that the Commission has recognized that the Atlantic Coast Line Company has responsibility for furnishing depot facilities both for the Southern and Atlantic Coast Line companies at Selma. This exception is not sustained.

Number five: Exception that the order required the defendant Southern Railway Company to participate in the construction, operation, and joint use of facilities under plans and specifications prepared by another railroad company. The said plans were submitted to the Corporation Commission by Mr. W. H. Newell, general superintendent of the Atlantic Coast Line Railroad Company. On 28 June, 1916, Mr. Newell wrote as follows:

"I beg to advise that I hope to be able to submit the plans to the Commission very shortly. They are now in the hands of the Southern Railway for approval." In his letter of 4 September, 1916, submitting

the said plans, Mr. Newell said: "The attached plans have been submitted to the Southern Railway Company and approved." Upon this record, the Commission assumed that the said plans were submitted on behalf of both the Atlantic Coast Line Railroad Company and the Southern Railway Company, and that the said plans represented the view of both these companies as to a proper compliance with the order of the Commission of 10 September, 1914, to provide adequate depot accommodations at Selma. If it be denied that the said plans represent the concurrence and approval of the Southern Railway Company, as well as the Atlantic Coast Line Railroad, then the Southern Railway Company is in default as to the order of 10 September, 1914, directed to the Southern Railway Company as well as to the Atlantic Coast Line Railroad Company, and directing each of them to submit to the Corporation Commission for approval plans for adequate depot facilities at Selma; and, if it be that the Southern Railway Company defaulted as to its compliance with this part of the order, the Southern Railway Company is estopped from complaint because the Atlantic Coast Line Railroad Company did comply with the said order, and did submit proposals of suitable plans for this purpose, and because the said plans were approved and adopted by the Corporation Commission as meeting the demands of its order of 10 September, 1914.

The specification as part of exception number five that it owns more of the land on which the depot is built than the Atlantic Coast Line offers no obstacle to the construction of the depot. There is a statutory remedy (C. S., 1042) by which the difference can be legally adjusted, if it cannot be adjusted by agreement. All of the necessary land is held by the two companies, and is now in joint use by the two companies as depot property.

That the location requires more of the right of way of the Southern than of the Coast Line. It is of record that the Coast Line has proposed to the Southern, in writing, that the number of square feet of its right of way to be used for depot be offset against an equal number of square feet of the Southern's right of way, and that the Coast Line be charged a reasonable rental by the Southern for its partial use of the balance. No reply has been made to that proposal. If the Southern endeavors to reach agreement with the Coast Line on this feature, and fails, the Commission would at any time, upon application, require the Coast Line to pursue the statutory method of acquiring its equal proportion of the Southern's right of way for this purpose. The Southern has done nothing but take advantage of eight years of indulgence and then to interpose every possible technical difficulty and objection in order to evade the performance of its obligations to the traveling public at this point.

Exception number six is not sustained by the evidence.

Exception number seven: That the order makes no provision for an apportionment between the Atlantic Coast Line Railroad Company and the Southern Railway Company as to the cost of the construction and operation of the proposed new union station. The order of 10 September, 1914, directed the Atlantic Coast Line Railroad Company and the Southern Railway Company jointly to construct the said depot, and this order was based upon evidence presented at the hearing showing the volume of passenger traffic handled by the two companies at Selma to be about equal, the traffic of the Southern Railway Company being slightly greater than that of the Atlantic Coast Line Railroad Company as shown by reports submitted by these companies respectively of their receipts from ticket sales at the Selma station for the preceding year, as follows: Atlantic Coast Line, $28,304; Southern Railway, $30,452. These figures represent actual ticket sales at Selma, and do not include revenue from passengers who use the Selma depot between trains on through tickets.

It further appears in the record that the Atlantic Coast Line Railroad Company proposed to the Southern Railway Company by letter of 29 April, 1922, that each of these companies should bear an equal proportion of the cost of construction of the Selma depot, and that no response to this written proposal has been made by the Southern Railway Company. This basis of division of cost we find upon the facts in this case to be equitable as between the parties, and, if anything, liberal to the Southern Railway Company. If the latter company desired or expected the Commission to adopt any other basis for division as to the cost of construction of this depot, its exception should have been made to the order of 10 September, 1914, directing these two companies jointly to construct this depot. The defendant Southern Railway Company did not file such exception, and has at no time requested the Corporation Commission to make an apportionment of the cost other than an equal division of the same, which we find upon the record to be a proper basis of apportionment.

Exceptions numbers eight, nine, ten, and twelve are not supported by the facts as disclosed in the record.

And we say the same as to exception number eleven, and, besides, as to this exception the details of the said plans were not prescribed by the Corporation Commission, but the said plans, as hereinbefore stated, together with the materials to be used in the construction of the station, are plans prepared by the Atlantic Coast Line Railroad Company, and, as we are advised, submitted to and approved by the Southern Railway Company before submission to the Corporation Commission.

Exception numbers thirteen and fourteen: The premises and conclusion set out in these exceptions have no bearing upon the obligation

of the Southern Railway Company to join with the Atlantic Coast Line Railroad Company in the construction of a union passenger station at Selma. The figures of operating revenue, presented in this exception number thirteen, do not correctly or fully represent the operations of the Southern Railway system, or its operations within North Carolina, for the year 1921. Its report to this Commission for the year 1921 shows operating receipts in excess of operating expenses, $22,886,143.05; and for its lines within the State of North Carolina, $7,161,743.90. Its net earnings in North Carolina last year were 33⅓ per cent greater than the basis of a fair return fixed by the Interstate Commerce Act. Its quarterly reports for the first three quarters of 1922 show improvement in gross and net earnings over 1921, and in the present and last quarter of the year it is understood to be handling the largest volume of business in the history of the Southern Railway system.

The record in this case and the facts within the knowledge of the Commission show that Selma is an important point of passenger transfer. The larger part of the passenger travel between northeastern North Carolina and the rest of the State passes through the Selma transfer. There is a heavy exchange and transfer of passengers between the line of these defendant companies at Selma every day in the year. No shed protection is provided for this heavy transfer of passengers, and the waiting-room accommodations are totally inadequate for the normal flow of passengers who frequently have to wait long periods of time for connections. No modern conveniences are provided, and upon any occasion of extraordinary travel large numbers of passengers are required to detrain and wait, without any accommodations or protection from weather conditions, whatever they may be, as only a small number of them can take advantage of the poor quality of accommodations that are available.

We have taken the pains to review the several exceptions of the Southern Railway Company, not because they have, or can have, any controlling legal effect, but to ascertain if they present any basis whatever for meritorious consideration of defendant's rights, in the opinion of the Court.

The Southern Railway Company sought delay, not improperly it may be conceded, in the performance of this obligation to the public in 1914, and not as a legal right, but as an indulgence, in times of stress, consequent upon the close of the Great War, in the performance of a recognized obligation to the public, and on that should, for the reason assigned, be suspended for a time, at least, but resumed after the return of more prosperous times, and its ability to comply with said obligation to the public, after having advantage for eight years of the benefits of its pleas for indulgence.

We find upon review of this record that the Southern Railway Company has no basis for appeal, and is therefore not entitled to have the record certified on appeal, and it is ordered that notice be served upon the defendant Southern Railway Company that if it shall fail within ten days from this date to present evidence satisfactory to the Corporation Commission that it will proceed in good faith and without delay to join with the Atlantic Coast Line Railroad Company in the execution of the order of the Corporation Commission of 10 September, 1914, to construct adequate depot accommodations at Selma, N. C., in accordance with plans submitted and approved in pursuance of said order, appropriate action will be taken to enforce the said order and to impose such penalties as have been or may hereafter be incurred for refusing to obey the said order, in accordance with the provisions of C. S., 1106.

This 20 December, 1922.

This is to certify that the above is a true copy of the order of the Corporation Commission in this record dated as above.

R. O. SELF,
Clerk, North Carolina Corporation Commission.

NORTH CAROLINA CORPORATION COMMISSION.

RALEIGH, N. C., 4 January, 1913.

I, R. O. Self, clerk of the North Carolina Corporation Commission, do hereby certify the foregoing and attached fifteen sheets to be a true copy of the records of this office.

In witness whereof I have hereunto set my hand and affixed the official seal of the Commission.

Done in office at Raleigh, this 4 January, in the year of our Lord 1923.

R. O. SELF, *Clerk.*

On reverse side of complaint appears the following: "Service accepted 5 January, 1923, by attorneys of respective parties."

ORDER.

This cause coming on to be heard before me upon the verified complaint and exhibits in the cause, it is ordered that the defendants, the Southern Railway Company and the Atlantic Coast Line Railroad Company, show cause before Hon. E. H. Cranmer, judge holding the courts of the Seventh Judicial District in the courthouse at Raleigh, N. C., at 11 o'clock a. m. Monday, 29 January, 1923, why the relief prayed for by the plaintiff in this proceeding should not be granted. That a copy of this order and the complaint be served upon said defendants as provided by law.

THOMAS H. CALVERT,
Resident Judge, Seventh Judicial District.

On reverse side of order appears the following: "Service accepted 5 and 10 January, 1923, by the attorneys of respective parties."

Filed 10 January, 1923.

We direct attention here to what is called in the record the answer of the Southern Railway Company, but merely for information, and as conducive, perhaps, to a better understanding of the facts and the position of the company, and as being fair to said company, but not admitting or conceding anything appearing therein as true, or as established in the case. The substance only of that answer will be given, as follows:

The Southern Railway Company, speaking generally, asserts in its answer that the obligation of providing adequate station facilities at Selma, N. C., rests upon the Atlantic Coast Line Railroad Company, it being only a renter of the station, or the use thereof, from that company, which is solely responsible for its condition, facilities, and upkeep, under an agreement between the companies dated 29 June, 1899.

That it has the right to appeal from the order dated 11 September, 1914, of the North Carolina Corporation Commission, although a very long space of time has elapsed since it was made, and relies also upon the order of 11 April, 1922, as giving this right; and further, that it had no proper notice of the order of 11 April, 1922, and no opportunity to be heard in regard to it, and that it was not a party to the proceeding in which that order was made. That the Commission has recognized the sole responsibility of the Atlantic Coast Line Railroad Company for the station and its facilities at Selma. That the order requires the use of a part of the respondent's property without making any provision for compensation to respondent therefor. That conditions have changed since 1914, and even since January, 1917, when the order of that date was made, which may necessitate new plans and specifications. That the order violates the due process clause of the Federal Constitution that there is no evidence to support the order, and it is without foundation in law or fact.

The said answer pleads the benefit of the act of Congress of 1920, known as the "Transportation Act," or Esch-Cummings Act, and alleges that its financial condition is such that it is not required or permitted by said act to construct and maintain such an expensive station or depot as that designated in the order of the commission, which will be productive of no revenue to it, and finally as one of its main defenses that the North Carolina Corporation Commission is acting beyond its powers, and interfering with interstate commerce and in violation of the above act of Congress in attempting to enforce its order of 11 September, 1914, or any of its orders relating to the subject, and that the same is contrary to Federal laws and Federal policy with respect to interstate railroads

and commerce between the states. We believe this summary of the very voluminous answer, and its exhibits, fairly and fully states the substance thereof.

On 11 April, 1922, the Corporation Commission made and entered upon its records the following order:

"Order, that the Atlantic Coast Line Railroad Company and the Southern Railway Company proceed with the construction of a union passenger station at Selma, N. C., in accordance with plans submitted by the Atlantic Coast Line Railroad Company, 9 January, 1917, and substantially on the site of the present passenger depot at Selma, and that the construction of same be completed within six months from this date."

To this order the Southern Railway Company entered exceptions, which are fully set forth in the record in this Court at pp. 30 to 36, both inclusive, but we have not set them out in extenso, because some of them, at least, are not sustained by the facts of the case as they appear by admission, findings, and otherwise.

The original order of the North Carolina Corporation Commission, dated 10 September, 1914, was in the following language:

ORDER.

Citizens of Selma v. Atlantic Coast Line Railroad Company and Southern Railway Company.

Pell, Commissioner: The above entitled cause came on to be heard upon a complaint from citizens of Selma of inadequate station facilities at the junction of defendant roads at that place. Evidence was taken and a personal inspection had by the Commission, and the fact found that inadequate facilities existed: Therefore, it is ordered that the defendant railroad companies erect at Selma, at the junction point, a station adequate for the future needs of such an important junction point; that the yards be so graded as to afford to all passengers proper facilities for taking trains, and that umbrella sheds be erected for the proper protection of the public.

It is further ordered that plans for the proposed station be submitted to this Commission by 15 October, 1914, for its approval.

10 September, 1914.

To this order no exception was taken by either of the respondents at the time it was made, nor for many years thereafter, to wit: about five of more years, nor until the said Commission, after indulging the railroads for that long space of time, ordered that they proceed at once with the work of constructing the station according to the plans and specifica-

tions adopted by them with the consent of the Commission, and then, for the first time, the Southern Railway Company set up its opposition to the enforcement of the said order, and in various but irregular ways attempted to except thereto.

The Corporation Commission refused to recognize the right of the Southern Railway Company to file exceptions, and held that it had waived its right to do so when the order was made in 1914, and that it actually consented to the order made, the Corporation Commission agreeing, in consideration of the existing financial condition of the railroads of this country and the difficulties brought about by the World War in the operation of them, to stay the enforcement of their judgment of 10 September, 1914, until the railroads were better able to comply with said judgment.

The Southern Railway Company thereupon filed a petition for *certiorari* in the Superior Court of Wake County before Judge Calvert, who transferred the hearing of the same to Judge Cranmer, presiding in the Superior Court of Wake County, and upon a full hearing by him of both sides to the proceedings, Judge Cranmer denied the petition for a *certiorari,* and directed a mandamus to be issued against the two railway companies to proceed with the construction of the station at Selma according to the order of 10 April, 1914, and according to the plans and specifications adopted for the purpose.

The Southern Railway Company excepted and appealed to this Court, the Atlantic Coast Line Railroad Company still agreeing to abide by the orders of the Commission and the court in all respects, and announced its readiness to coöperate with the Southern Railway Company in carrying out the same.

Attorney-General Manning and Assistant Attorney-General Nash for Corporation Commission.

Manly, Hendren & Womble for Southern Railway Company.

Murray Allen for Atlantic Coast Line Railroad Company.

WALKER, J., after stating the case: These two cases are so intimately related to each other that a decision of one of them (No. 254) will suffice as to both.

No. 254 was originally an application by the Corporation Commission to the Superior Court of Wake County for a mandamus against the appellants, the Southern Railway Company and the Atlantic Coast Line Railroad Company, to compel them to erect a union station at Selma, N. C., in accordance with an order of the Commission made 10 September, 1914.

This proceeding was originally commenced before the Corporation Commission, in the name of the citizens of Selma and patrons of the

two railroad companies at that place, including the public generally, against the Atlantic Coast Line Railroad Company and the Southern Railway Company, but when, by reason of the opposition of the Southern Railway Company, it assumed the nature of serious litigation between really adversary parties, the Attorney-General intervened, in behalf of the State, and thenceforward it was prosecuted in the name of "The State of North Carolina on relation of the North Carolina Corporation Commission v. The Southern Railway Company and the Atlantic Coast line Railroad Company," and this change in name was in accordance with approved practice and procedure in our courts as defined by local statutes and the decisions of this Court, although it does not, in any respect, change the substantial character of the proceeding.

The Atlantic Coast Line Railroad Company does not now make, and has not at any time made, resistance to the full execution of the order or judgment entered by the Corporation Commission on 10 September, 1914, but is willing and ready to proceed at once with the necessary work in constructing the station or depot at Selma, N. C., according to the order of the Commission and the plans and specifications already agreed upon by the two railroad companies.

The Southern Railway Company met the application of the Corporation Commission in this case (No. 254) for a writ of mandamus to enforce compliance with its order or judgment of 10 September, 1914, by a counter application to the court for a *certiorari* (No. 255) to the Corporation Commission, directing it to send up the record on appeal from its order of 11 April, 1922, to the Superior Court of Wake County in accordance with the provisions of the statute. As the Atlantic Coast Line Railroad Company has stood ready to obey the order of the Commission of 10 September, 1914, and is still ready to obey it, it is manifest from this statement that the application of the Corporation Commission for a mandamus is necessarily based upon the failure of the Southern Railway Company to appeal from the order of 10 September, 1914, and its attempt now to force, if it can, a recognition of its right to be heard, which it had expressly waived in 1914, and which has been altogether forfeited by it. This includes, also, an assumption by the State, now the plaintiff, that the order of 11 April, 1922, was not an order from which the railroad could appeal; or, in the alternative, that said railway company did not appeal from said order of 11 April, 1922, in the manner provided by law, and, consequently, assuming that such order was appealable, that the company would still not be entitled to a *certiorari* from the Superior Court.

Of course, from this statement it is apparent that if the Court should hold that the Southern Railway Company was entitled to appeal from the order of 11 April, 1922, or that, if so, it had conformed to the law

in its attempt to appeal, or was prevented from doing so by an illegal act of the Corporation Commission, then the Commission would not under the statute be entitled to a mandamus, but the Southern Railway Company would be entitled to its writ of *certiorari* to the Commission requiring it to send up the record upon its appeal. This part of the opinion, then, will be directed to a discussion of these points, in the following order, leaving for after discussion the point which goes directly to the authority of the Commission to make the orders at all.

The order or judgment of 10 September, 1914, was in its nature both in form and effect a final order or judgment, which the Corporation Commission could have enforced at once in the courts if neither of the respondent railroads had appealed from it. It is expressly admitted by both of them that no appeal was taken from that order. In consequence, however, of a direct application to the Corporation Commission by these railroads, but especially the Southern, for relief on account of the financial condition existing at the time of the order, the Corporation Commission held up or stayed its enforcement temporarily, awaiting better conditions.

The Commission's authority to make the order hereinbefore set out is found in C. S., 1041 and 1042. Section 1041 is as follows: *"To require change, repair, and additions to stations.* The Commission is empowered and directed to require a change of any station, or the repairing, addition to, or change of any station house by any railroad or other transportation company in order to promote the security, convenience, and accommodation of the public, and to require the raising or lowering of the track at any crossing when deemed necessary."

Section 1042 is as follows: *"To provide for union depots.* The Commission is empowered and directed to require, when practicable, and when the necessities of the case, in their judgment, require, any two or more railroads which now or hereafter may enter any city or town to have one common or union passenger depot for the security, accommodation, and convenience of the traveling public, and to unite in the joint undertaking and expense of erecting, constructing, and maintaining such union passenger depot, commensurate with the business and revenue of such railroad companies or corporations, on such terms, regulations, provisions, and conditions as the Commission shall prescribe. The railroads so ordered to construct a union depot shall have power to condemn land for such purposes, as in case of locating and constructing a line of railroad: *Provided,* that nothing in this section shall be construed to authorize the Commission to require the construction of such union depots should the railroad companies at the time of application for said order have separate depots, which, in the opinion of the Commission, are adequate and convenient and offer suitable accommodations for the traveling public."

These sections, then, conferred the power which the Commission has heretofore exercised in this proceeding.

It is a valid exercise of legislative power, and being remedial, will be liberally construed. *Dewey v. R. R.*, 142 N. C., 392; *Griffin v. R. R.*, 150 N. C., 312.

C. S., 1708, confers authority upon any railroad company to condemn land for the purpose of getting to a union depot. The following order was made by the Commission on 10 September, 1914:

"Pell, Commissioner: The above entitled cause came on to be heard upon a complaint from citizens of Selma of inadequate station facilities at the junction of defendant roads at that place. Evidence was taken and a personal inspection had by the Commission, and the fact found that inadequate facilities existed; therefore, it is ordered that the defendant railroad companies erect at Selma, at the junction point, a station adequate for the future needs of such an important junction point; that the yards be so graded as to afford to all passengers proper facilities for taking trains, and that umbrella shed be erected for the proper protection of the public.

"It is further ordered that plans for the proposed station be submitted to this Corporation Commission by 15 October, 1914, for its approval."

We repeat that at the request of the Southern Railway Company this order was not enforced at that time, the request being based upon financial conditions as they were at the beginning of the World War.

In January, 1917, the Atlantic Coast Line Railroad Company filed with the Corporation Commission plans for the union depot required to be erected by the two railroad companies by the order of 10 September, 1914. These plans were submitted to the Southern Railway Company before being filed with the Corporation Commission, and were approved by that company. Thereafter, conditions still being bad, no further steps were taken by the Commission to enforce the order of 10 September, 1914, until the supplemental order of 11 April, 1922, requiring the order to be executed by the companies.

The order of 11 April, 1922, was the one which disposed of all the proceedings for State union passenger stations which had been pending before the Corporation Commission, *i. e.*, stations at Kinston, Selma, Newton, and Plymouth. That order recites that the Atlantic Coast Line Railroad Company and the Southern Railway Company had prepared and submitted plans under order of the Commission for a new passenger station at Selma in 1917. It further recites: "Before the contracts were let for the construction of these depots, conditions developed which had the effect of suspending capital expenditures for depot construction on practically all railroad lines in the United States. These conditions have been fully understood by the public, which has with

great patience accepted inadequate accommodations, in many cases, until conditions or normal prosperity for the carriers should return, when capital expenditures for such facilities could reasonably be required. The time has not yet come when the carriers can reasonably be expected to enter upon a general policy of large expenditures for depot construction. But in the cases we are now considering, where the inadequacy of facilities was pronounced and definitely ascertained, after full hearing and investigation five years ago, we are convinced that there should be no further suspension of orders made at that time looking to the provision of adequate passenger station facilities at Kinston, Selma, and Newton, and orders will now be made for construction of these facilities as planned in 1917, and in doing so, we wish to make acknowledgment of appreciation of the patience and consideration which the traveling public has borne with inadequate facilities at these points, and particularly to the citizens of Kinston, whose depot accommodations have been most inadequate."

The order itself was as follows: "Ordered, that the Atlantic Coast Line Railroad Company and the Southern Railway Company proceed with the construction of a union passenger station at Selma, N. C., in accordance with plans submitted by the Atlantic Coast Line Railroad Company, 9 January, 1917, and substantially on the site of the present passenger depot at Selma, and that the construction of the same be completed within six months from this date."

The Southern Railway Company filed no exceptions at all to the order of 10 September, 1914; it gave no notice of appeal to the order of 11 April, 1922, within the statutory period required by C. S., 1097, and filed no exceptions within such time. That company claims that the time was extended by the Corporation Commission to 8 May, 1922, and that it did file exceptions on the latter date, 8 May, 1922. It further claims that the Corporation Commission, on 20 May, 1922, overruled such exceptions, and that it, in obedience to the statute and within ten days of the decision overruling its exceptions, gave notice of appeal, and further at that time complied with the statute.

This order, however, was a general one overruling exceptions in all cases then pending before the Corporation Commission. It is manifest, we think, that the only order in the record which affected any legal right of the Southern Railway was that of 10 September, 1914, which was admittedly not appealed from. The subsequent orders were simply supplemental to the original order, and required no more than that order required, but were made after the Southern Railway Company had notice of the intention of the Corporation Commission to enforce the order of 1914, and they were made with the sole purpose of enforcing that order. All the delay was occasioned by the request of the Southern

Railway Company for indulgence on account of the financial conditions as they had previously existed. In 1922, however, these objections to the enforcement of the order had been eliminated. Both freight and passenger rates had been increased and the volume of business done by the Southern Railway Company and its net income from such business had been materially and enormously increased. So, these orders were nothing but an expression of the intention on the part of the Commission, under changed conditions, to enforce the order made in 1914, by cancelling the stay.

An exception, in this view of the matter, could not under our local law and procedure, be entered by the Southern Railway Company, and if it could, it would not by its own force bring under review of the court to which the case would, in a proper case and by appropriate procedure, be transferred, or in which it would be docketed for hearing, the order of 10 September, 1914. It was, therefore, vain and idle for the Southern Railway Company to challenge by exception the validity of the order the Commission made on 11 April, 1922, in the hope that it would by some legal legerdemain retrieve its failure to except when the order or judgment of 10 September, 1914, was entered by the Commission. The truth is that these subsequent exceptions, with all due respect and deference to the Southern Railway Company, are the baldest afterthought, and suggested, perhaps, by the intervening passage by the Congress of the United States of the Transportation Act of 1920, or what is known as the Esch-Cummings Act, which will be notice hereafter. At any rate, there was no exception to the order or judgment of the Commission, dated 10 September, 1914, and it thereby, under our law and procedure, became a final judgment of the Commission, unimpeached and unassailable, as there is no allegation of fraud in obtaining it, or other ground in equity upon which it can be attacked.

The order of 11 April, 1922, did not have the effect, under local law and procedure, to reopen the judgment of 1914, but was simply a notice to the railroad companies in all the cases then before the Commission relating to the improvement of stations and depots, that the time for longer favor and indulgence had ceased by reason of the radical change in financial conditions, and the revival of trade and traffic, and that the judgments of the Commission in all designated cases must be obeyed, and the depots or stations improved. It would be strange, indeed, if what was intended solely as the discontinuance of an act of grace and favor, or "leniency," to use the word in the record, by the State, through its Commission, could be turned into something that will thwart or defeat its good purpose and intention to promote the safety, convenience, and comfort of its citizens, and the patrons of the railroads, by bettering the conditions at various railroad stations throughout the State, on its intra-

state lines, and it will require a very clear indication of such a purpose on the part of the Congress of the United States to convince us that any interference with such a just and beneficent scheme was intended by it.

The judgment of the Commission, dated 10 September, 1914, being therefore a final one, under local law and practice, and not excepted to at all, and certainly not in the proper manner, settled conclusively the rights of the parties thereto, and, it may be added, the Commission had full and ample jurisdiction to render the judgment, as it did, after notice and hearing. The respondent, consequently, has enjoyed to the full the asserted right of due process, and the cognate one of the law's equal protection, and is really seeking now to have more than its proper and equal share of both.

And finally, we hold that the alleged agreement on the part of the Commission extending the time for filing exceptions to the order of 11 April, 1922, if ever made, did not, as a matter of law under our practice and procedure have the effect to grant or extend the time for excepting to the final judgment of this court of record entered on 10 September, 1914. The notice or order, if it may be so called, of 11 April, 1922, was not any judicial determination of the Commission, nor was it of such nature that it could be excepted to and appealed from. It was a mere notification that the grace or favor extended to the railroad companies had ceased and would no longer be recognized, and it was a matter entirely within the discretion of the Commission, and for that reason, if for no other, was not appealable.

Upon inspection of the statute and decisions of this Court, it will be seen that an appeal, in order to be a valid one, must have been taken within the time prescribed by law. The records of the Commission, which is made by C. S., 1023, a court of record, show no appeal taken by the Southern Railway Company within the statutory time, and it is suggested now that there was a verbal understanding that it should have further time, but absolutely nothing to that effect is disclosed by this record. The records must show that an appeal was duly taken. *Howell v. Jones,* 109 N. C., 102, and cases there cited.

The statutory notice of appeal is mandatory, and the time within which such notice may be given cannot be extended by the parties of record. As a matter of fact, however, there was nothing in the order of 11 April, 1922, when interpreted in connection with the order of 10 September, 1914, and the proceedings before the Commission, which at all affected the rights of the Southern Railway Company, and so no appeal would lie from that order, and we so hold. *Hardware Co. v. R. R.,* 147 N. C., 483. We may take it as established, then, that there was no appeal in this case, and that the right to the mandamus under C. S., 1103, is a clear and established right. In such cases the mandamus

issues as a matter of course. *Betts v. Raleigh*, 142 N. C., 229; *Edgerton v. Kirby*, 156 N. C., 347; see, also, *Dula v. School Trustees*, 177 N. C., 426; *Hamlin v. Carson*, 178 N. C., 431; *Corporation Com. v. R. R.*, 170 N. C., 560.

C. S., 1103, permits the mandamus asked for in this case, and is as follows: *"Peremptory mandamus to enforce order, when no appeal.* If no appeal is taken from an order or judgment of the Corporation Commission within the time prescribed by law, but the corporation affected thereby fails to put said order in operation, the Corporation Commission may apply to the judge riding the Superior Court district which embraces Wake County, or to the resident judge of said district at chambers, upon ten days notice, for a peremptory mandamus upon said corporation for the putting in force of said judgment or order; and if said judge shall find that the order of said commission was valid, and within the scope of its powers, he shall issue such peremptory mandamus. An appeal shall lie to the Supreme Court in behalf of the Corporation Commission, or the defendant corporation, from the refusal or the granting of such peremptory mandamus."

The Southern Railway Company, however, contends that the order directing the construction of this depot was one beyond the competency of the Corporation Commission, since the enactment of what is known as the Transportation Act of 1920 (41 Statutes at Large, pp. 474 *et seq.*), and as sustaining that view, the counsel for the railroad cite *R. R. Commission of Wisconsin v. R. R.*, 42 Sup. Ct. Rep., p. 232, and *R. R. v. R. R. Commission*, 221 Pac. (Calif.), p. 460.

This suggestion, with all due respect, as we submit, disregards the facts of this case. This station at Selma is necessary for the convenience of the people who use the Southern Railway for transportation from point to point within the State. That portion of the Southern Railway which passes through Selma is one of its branches that runs from Goldsboro, N. C., to Greensboro, N. C. (as the *terminus a quo* and the *terminus ad quim*), and consequently it is wholly an intrastate line, and a part of the North Carolina Railroad leased to it, and operated solely in this State. It carries no passengers without the State, taken on at Selma, but only to local points. This is necessarily true from the fact that the Selma station is located upon the direct north and south main line of the Atlantic Coast Line Railroad Company. A passenger would, in preference to the Atlantic Coast Line, take the Southern at Selma and travel 130 miles to Greensboro before commencing his northern journey. This, also, would apply to the passenger who wished to go south. So far as the station at Selma is concerned, then, it is for the convenience and comfort of *local* passengers. If the Southern's part of the cost of erect-

ing this station should prove to be $25,000, it could in no sense be a direct burden upon interstate commerce, and in no sense an undue, unreasonable, and unjust discrimination against interstate commerce within the principle of the *Wisconsin Intrastate Rates Case, supra. Chief Justice Taft,* as is usual with him, favors us with a very clear and able discussion of this question as to interstate and intrastate commerce, and closes the opinion as follows: "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard would be directed to substantial disparity which operated as a real discrimination against an obstruction to interstate commerce, and must leave appropriate discretion to the State authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce."

It appeared as a fact in that case that the difference between the intrastate rates fixed by the State of Wisconsin and those fixed by the Interstate Commerce Commission resulted in the loss to the railroad involved of $6,000,000 per year. In the *New York case, supra,* it would have been $12,000,000. It was in this enormous disproportion that the Supreme Court of the United States found the discrimination against interstate commerce.

As pertinent to this part of the discussion, we refer to Ruling Case Law, vol. 5, title "Commerce," p. 702, sec. 15, which reads as follows: "In the exercise of the police power, the states or their municipalities may enact statutes and ordinances to protect the public health, the public morals, the public safety, and the public convenience; that is, they may adopt any legislation or regulation for any of those purposes and relative to interstate or foreign commerce, provided such laws or ordinances are local in their character and affect interstate commerce incidentally only, and especially is such a power favorably recognized when it is so exercised as to be an aid to such commerce. It has even been said by the Supreme Court of the United States that the proper exercise of the police power is not only a right of a state, but that a state is under an obligation to establish such regulations as are necessary or reasonable for the welfare and safety of all domiciled within its limits. A statute, however, purporting to have been enacted to protect the public health, the public morals, the public safety, or to serve the public convenience must have some real or substantial relation to those objects, and cannot, in any event, be allowed to operate so as directly to burden or trammel interstate or foreign commerce, or to trench upon those subjects which

are national in their character and which are within the exclusive power of Congress to regulate. A presumption may and should be indulged that a statute was enacted in good faith, for any of the purposes for which this police power can be exercised, but its operation and validity must be determined by its natural and reasonable effect. The exercise of the state's police power must yield when it comes in conflict with an affirmative exercise by Congress of its power to regulate commerce, but in the application of this principle of supremacy of an act of Congress in a case where the state law is but an exercise of this reserved power, the repugnance or conflict should be direct and positive, so that the two acts cannot be reconciled or consistently stand together. The reference at this place to the police power of the states must necessarily be general, and merely suggestive, as the discussion throughout the article hereafter of the different subjects of regulation has relation largely to the exercise of this power with reference thereto, and to the power of the states to legislate with respect to their purely local concerns incidentally affecting commerce."

Just in this connection we wish again to call attention to a portion of the order of the Corporation Commission made on 11 April, 1922: "The time has not yet come when the carriers can reasonably be expected to enter upon a general policy of large expenditures for depot construction. But in the cases we are now considering, where the inadequacy of facilities was pronounced and definitely ascertained after full hearing and investigation five years ago, we are convinced that there should be no further suspension of orders made at that time looking to the provision of adequate passenger stations."

It is apparent from this that the Corporation Commission had not entered upon any large scheme compelling the erection of stations at local points or union stations at connecting points. It was dealing with and purposed only to deal with those necessary stations, the condition of which had so taxed the patience and disappointed the just expectations of travelers in North Carolina. There can be no claim, then, upon this record that there has been any discrimination against interstate commerce, or any such wholesale requirement of the construction of new stations as to impair materially the income of railroads engaged in interstate commerce. The particular station involved, as we have shown, so far as it concerns the Southern Railway, is one which interstate travelers scarcely use.

The headnote to the *California case* cited by the counsel for the Southern Railway Company sufficiently shows the extent and scope of that decision: "Interstate Commerce Act, sec. 5, par. 1, subds. 4, 5, as amended by Transportation Act, 28 February, 1920, sec. 407, and sec. 15 a, as aided by sec. 422, extending the powers and duties of the

Interstate Commerce Commission, sec. 1, subd. 3, as amended by sec. 400 and subds. 10, 15, 18-20, as amended by sec. 402, investing the Commission with powers over the changes in lines, tracks, etc., of railroads engaged largely in interstate commerce, sec. 1, subds. 21, 22, as amended by sec. 402 and sec. 3, subds. 3, 4, as amended by sec. 405, limiting the extension of authority of the Commission to railroads wholly within the state not operated as part of the general systems, gives power and authority over the matter of union terminal depot facilities of railroads, largely engaged in interstate commerce, to the Interstate Commerce Commission, and by the act the State Railroad Commission has been divested of the power over the subject."

It is manifest, we think, from this that the California Court was dealing with an entirely different situation from that presented in this case. The Transportation Act of 1920 expressly dealt with terminals and the laying of tracks to those terminals. *Chief Justice Taft,* in his opinion in the *Wisconsin Passenger Rate case,* refers to that fact as follows: "The act sought to avoid excessive incomes accruing, under the operation of section 15 a, to the carriers better circumstanced by using the excess for loans to the others and for other purposes. The act further put under the control of the Interstate Commerce Commission, first, the issuing of future railroad securities by the interstate carriers; second, the regulation of their car supply and distribution, and the joint use of terminals; and third, their construction of new lines and their abandonment of old lines. The validity of some of these provisions has been questioned. Upon that we express no opinion. We only refer to them to show the scope of the congressional purpose in the act."

We have examined the act of 1920 carefully, and we do not find any provision therein which grants to the Interstate Commerce Commission, either expressly or by clear implication, the power, or which makes it its duty, to require the erection of passenger stations. It is not claimed in this case that such an order has been made by the Interstate Commerce Commission. The right of the State, then, to act in this particular is expressly preserved to it by the Transportation Act of 1920, sec. 402, subsec. 17 (41 Stat. at Large, p. 477), as follows: *"Provided, however,* that nothing in this act shall impair or affect the right of a state, in the exercise of its police power, to require just and reasonable freight and passenger service for intrastate business, except in so far as such requirement is inconsistent with any lawful order of the Commission made under the provisions of this act."

It is noticeable that the Corporation Commission expressly disclaimed any intention or purpose to require the railroads in this State to enter upon a general system of station or depot improvement. It is simply requiring them to perfect and complete improvements found necessary

eight and one-half years ago. If all of these improvements are made as ordered by the Commission, there could, by no possibility, be any decreasing of the incomes of these railroads in such way as to constitute the expenditure a burden upon interstate commerce or impair the ability of the railroads to serve the public in such interstate commerce.

Further discussing the act of the Congress of 1920, therein designated as the "Transportation Act," or the "Esch-Cummins Act," we say in the beginning that that act was approved 28 February, 1920, and its terms, and the language used by the Congress, indicate clearly the purpose that it should have a prospective operation. It looks to the future and not to the past. At least, this is the general rule, says a great law-writer, that acts of the Legislature will not be so construed as to make them operate retrospectively, unless the Legislature has explicitly declared its intention that they should so operate, or unless such intention appears by necessary implications from the nature and words of the act so clearly as to leave no room for a reasonable doubt on the subject. The reason for this rule is the general tendency to regard retrospective laws as dangerous to liberty and private rights, on account of the liability to unsettle vested rights or disturb the legal effect of prior transactions. "Retrospective laws being in their nature odious, it ought never to be presumed the Legislature intended to pass them, where the words will admit of any other meaning." "Legislation of this character is exceedingly liable to abuse, and it is a sound rule of construction that a statute should have a prospective operation only, unless its terms show clearly a legislative intention that it should operate retrospectively." Generally, when the Legislature designs that a statute shall operate upon past or present facts or transactions as well as upon future transactions, its intention in that regard will be expressed by apt words. Black on Int. of Laws (1896), pp. 250-252. And the same is laid down in another treatise which has met with high commendation and much approval, as follows: "Purely retrospective laws involve the exercise of judicial rather than strictly legislative power. Operating not only on future rights and liabilities, but also on matters that occurred, or rights and liabilities that existed before the time of enactment, they pronounce judgment on what was done before their enactment. Every law that takes away or impairs rights that have vested under existing laws is generally unjust, and may be oppressive. Hence, such laws have always been looked on with disfavor. It is a maxim, which is said to be as ancient as the law itself, that a new law ought to be prospective, not retrospective, in its operation (*nova constitutio futuris formam inponere debet non praeteritis*). The objection to retroactive legislation has also been expressed in the maxim *Leges quae retrospiciunt raro, et magna cum cautione sunt adhibendæ neque enim Janus locatur in legibus,*

'laws which are retrospective are rarely and cautiously received, for Janus has really no place in the laws.' The American constitutions have invariably imposed limitations on this class of legislation. While the Constitution of the United States and the constitutions of many of the states contain no provisions directly forbidding retrospective laws, such laws are void if they impair the obligation of contracts or vested rights. Even though the Legislature may have the power to enact retrospective laws, a construction which gives to a statute a retroactive operation is not favored, and such effect will not be given unless it is distinctly expressed or clearly and necessarily implied that the statute is to have a retroactive effect. There is always a presumption that statutes are intended to operate prospectively only, and words ought not to have a retrospective operation unless they are so clear, strong, and imperative that no other meaning can be annexed to them, or unless the intention of the Legislature cannot be otherwise satisfied. Every reasonable doubt is resolved against the retroactive operation of a statute." 25 R. C. L., at p. 785, sec. 35 *et seq.* But authorities substantially to the same purport could be greatly multiplied. Cooley Const. Lim., 370. This rule against retrospective laws is not only of great antiquity and dignity in the English law, but is also recognized in various foreign systems. It was a part of the imperial Roman law. *"Leges et constitutiones futuris certum est dare formam negotiis," etc.* Codex Lib. I, title 14, sec. 7. It is so provided in the Civil Code of France, art. 2; Black's Int. of Laws, p. 251, note 11.

We do not even suggest or intimate that any right has become vested by the proceedings before the State Corporation Commission, but courts, we believe, will apply as nearly as they properly can this principle in the construction and operation of statutes, both Federal and State, because it is so just, fair, and right that it should prevail, and especially so when the proceedings have finally passed or culminated unto a solemn judgment of the tribunal having full jurisdiction as a court of record to hear evidence, as was done, and adjudge according to the law and the rights of the parties under it.

There is absolutely nothing, as we think, in the contention of the respondent that, what it calls the order of 11 April, 1922, was, or was intended to be, a revival or reinstatement of any right they had lost by waiver or surrender, for under a proper construction of the statute of this State relating to the Commission and regulating the proceedings in that court, it was nothing more, and was not intended to be anything more, than a mere notification to the respondents that the stay or execution it had granted, not as being at all compulsory upon it, but as a mere act of grace or favor to them in view, and in lenient consideration of their embarrassed financial condition growing out of the war and the

operations of their lines or systems by the Government must cease and thereafter be of no effect. The respondent has given far too technical a construction of the actings and doings of the North Carolina Corporation Commission. It has really done nothing more than indulge or accommodate the respondent, and while the members of that honorable body are benevolently disposed sometimes to extend rather too liberally or generously favors to counsel or parties, which may prove to be detrimental to the public good, or the promotion of its interests, we are quite sure they did not intend to do so in this case, nor did they suppose, or for a moment anticipate, that either of the respondents would attempt to turn into an advantage what was intended merely as an act of grace, or leniency, in dealing with the question before it, because of the financial stress and embarrassment of the railroad companies consequent upon the late war, and seek protection and refuge in an appeal to a law passed long since the final judgment was rendered by the Commission, but which fortunately has no application, near or remote, to this case, as can be easily shown. The Esch-Cummins Act, designated in the act itself as the "Transportation Act of 1920" (U. S. Statutes at Large, vol. 41, Public Laws (Part 1) of the 66th Congress, p. 456 *et seq.*, applies to terminals and terminal facilities (sec. 400 (3), p. 474), and while the respondent, by reasoning, which with deference we say is not at all logical or clear, attempts to extend this plain and perfectly understandable provision to the Selma station and the connection at that place, it is manifest that no provision or clause of that subdivision of the act, or any other similar expression of the act, was intended to have any such application or meaning. The language simply means what it says, and nothing more and nothing otherwise, and the argument that the expenditure necessary to make the station construction and improvement required will so tax the resources of the respondent that it will be disabled to carry on its general traffic, or to perform its other duties, and will be impracticable without substantially impairing the ability of a carrier to handle its own normal business adequately. But it must be understood and emphasized just here that this reference to the "impaired ability" of the carrier in the act refers only to "terminal facilities," and is not made applicable to those along the line or route of carriage or transportation. The respondent relies on this provision in the act, as if it did apply to the kind of station and other facilities at Selma, which are not terminal in character, but take it that it does, we see that there will be no such impairment of the carrier's ability in the performance of its general or specific duties to the public. The effort of the respondent to show that it will is not only feeble, but utterly impotent and unavailing. The record shows the contrary, and the carriers' resources are constantly increasing.

We might take up the provisions of the act of 1920 in detail, but such a consideration of it would lead merely to the same conclusion, that enforcing the judgment of the Commission will not have the effect "to burden or trammel interstate or foreign commerce, or to trench upon those subjects, which are material in their character, and which are within the exclusive power of Congress to regulate," as was said *supra* in 5 R. C. L., pages 702, 703, and 704, but it would rather have the opposite effect and tend to be an aid to commerce, and so, as the books and authorities all state, should receive from the courts favorable recognition, especially when there can be harmonious operation of both systems of laws.

We have carefully read and considered the authorities relied on by the respondent, in connection with its construction of the Transportation Act of 1920 (Esch-Cummins Act), and are unable to see how they apply here, or have any helpful bearing upon the questions raised in this record. The California case (*Atchison, etc., Company v. Railroad Commission,* 211 Pacific Reporter, 460) discusses and decides questions totally different from those under consideration here, which we have fully shown above in referring to the provisions of the Transportation Act of 1920, as to terminal facilities. The same may be said of respondent's answer to the citation by Mr. Nash, Assistant Attorney-General, of *Mo. Pac. Railroad Co. v. Larabee Flour Mills Co.,* 211 U. S., 612. The citation by respondent, the Southern Railway Company, of *Railroad Commission of Wisconsin v. Chicago, etc., Railroad Company,* 257 U. S., 563, is equally unfortunate, and the quotation from the opinion of *Chief Justice Taft* does not prove anything useful to the respondent in this case. He said: "It is manifest from this very condensed recital that the act made a new departure. . . . The new measure imposed an affirmative duty on the Interstate Commerce Commission to fix rates and to take other important steps to maintain adequate railroad service for the people of the United States. This is expressly declared in section 15a to be one of the purposes of the bill." And the contention that rates are inseparably connected with and conditioned upon "efficient and economical management and reasonable expenditure for maintenance of way, structures and equipment" by interstate railroads, indicates that Congress has occupied the field of carrier expenditure for such facilities as depots, certainly at junction points between two interstate railroads, and the State power must be subordinated to the Congressional definition of carrier duty, does not, if true, advance the respondent one single step towards the goal it is seeking to reach, and is without any significance, if not entirely irrelevant to a discussion which is pertinent to the case. It all may be fully granted or conceded, and yet we find it proves nothing, if the last quotation from respondent's brief does not contain a complete

non sequitur. Some of its general assertions may be admitted without in the least impairing the strength or logical correctness of our conclusion or the argument that supports it.

While the Esch-Cummins bill was being debated on the floor of the House of Representatives, Congressman McClintic of Oklahoma offered the following amendment (Congressional Record, 15 November, 1919, p. 9067): "*Provided further*, that the Commission is hereby given authority to require a carrier to maintain his present arrangement or to make new arrangements relative to the joint use of depots, upon such terms as shall be found by the Commission to be just and reasonable. No carrier shall be allowed to discontinue the use of a depot in connection with another carrier until proper application has been made to the Commission." The purpose of this amendment, as explained by Congressman McClintic (pp. 9067-9068) was to give the Interstate Commerce Commission jurisdiction over union passenger depots, largely for the purpose of preventing the railroad companies from tearing apart the unification of passenger depots so extensively established by the government during the Federal operation of the railroads. Chairman Esch opposed the adoption of the amendment on the ground that jurisdiction over such matters had always been vested in the various states, and should continue to be exercised by them. Chairman Esch said (Congressional Record, 15 November, 1919, p. 9068): "Mr. Chairman, the matter which the gentleman from Oklahoma seeks to reach by his amendment lies almost wholly within the police power of the several states. There have been amendments offered to this bill seeking to preserve such police powers. The committee in framing the bill has sought not to encroach upon such powers. The matters of depots and joint use of depots is practically in the jurisdiction of the state commissions, and all but one of the states have such commissions. In such small matters the detail should be left within the jurisdiction of the state authorities, who know the situation, know the conditions, and know how best to meet the needs. There is, however, a provision in this bill providing for the joint use of terminals." Mr. McClintic thereupon offered to withdraw the amendment, but another member insisted on having a vote thereon. Thereafter his amendment, which would have conferred upon the Interstate Commerce Commission jurisdiction over union passenger depots, was rejected (Congressional Record, 15 November, 1919, p. 9071). This would seem to indicate that the Congress saw fit to leave the Federal Commission without jurisdiction, understanding that the matter of union stations would continue within the jurisdiction of the state commissions.

The propriety of referring to statements made by a committee member in charge of a bill, of course, is well recognized. See *Church of the*

Holy Trinity v. United States, 143 U. S., 457; *United States v. St. Paul, etc., Railway,* 247 U. S., 310; *Duplex Printing Co. v. Deering,* U. S. Supreme Court Advance Opinions, 1920-21, page 176; also the *Wisconsin Passenger Fare case.*

We would also call attention to the following language in *State of Texas v. Eastern Texas R. R. Co.* (decided 13 March, 1922): "As a whole, these acts show that what is intended is to regulate interstate and foreign commerce, and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class. They contain many manifestations of a continuing purpose to refrain from any regulation of intrastate commerce, save such as is involved in the rightful exertion of the power of Congress over interstate and foreign commerce."

The construction of a union station may be necessary for purposes of intrastate commerce. If Congress has refrained from any regulation of such commerce, and has left to the state, in the exercise of its police power, the right to require reasonable provision for intrastate passenger business, then the state must have the power to require the construction of such station, especially as it will not interfere with interstate commerce, but rather will tend to aid it.

The contention of the respondent railway company comes to this, that the Congress, in passing the Transportation Act of 1920 (Esch-Cummins Act), intended to give it, not only a retrospective meaning and signification, but such a retroactive effect that it would reach back and upset even solemn and well considered judgments and final determinations of courts of record, made upon ample evidence after full argument and consideration, and which adjudicated upon the rights of the parties as to all questions involved in the litigation. We have seen by his own clear and unmistakable utterances that its author, or, at least, one of its authors, repudiated such a suggestion while the law was in the making, when he indicated that it was intended, as little as possible, to interfere with the free action of the states in the enforcement of their police regulations, and only to intervene when imperatively demanded for the enforcement of the Federal law as to interstate commerce or its protection and preservation for full operation where required. We cannot think, upon a bare inspection of that much discussed and criticised law, that the Congress intended it should have such far-reaching effect and consequences, and that it should obstruct the State Corporation Commission in the exercise of its proper and legitimate functions, and especially when it was not interfering with interstate commerce, but proceeding in aid of it and for the advantage and convenience of the public. Legislation construed to have the opposite meaning would be considered, not only as unusual, but as startling. *R. R. v. Railway Commission,*

211 Pacific Reporter, No. 3, Feb., 1923, p. 460, and the Wisconsin case (*Railroad Commission v. R. R.*, 42 Supreme Court Reporter, 232), do not conflict with our view of the matter, nor do they, or other cases cited, militate against it, but are easily reconciled with it, when properly construed. Referring to *R. R. v. Larabee Flour Mills*, 29 Supreme Court Reporter, 214, the Court, in *R. R. v. Railroad Commission, supra*, says, at p. 464 of Sup. Ct. Reporter: "That case held that the mere delegation by Congress to the Interstate Commerce Commission of power to act in a given matter did not prevent such action by the state authorities unless the Commission had taken action in the particular matter involved, quoting therefrom the following: 'Until then the authority of the state in merely incidental matters remains undisturbed. In other words, the mere grant by Congress to the Commission of certain national powers in respect to interstate commerce does not of itself, and in the absence of action by the Commission, interfere with the authority of the state to make those regulations conducive to the welfare and convenience of its citizens.'" And just before it had reached the quoted passage, the Court further said, referring to the Esch-Cummins Law or Transportation Act of 1920: "The transportation Act of 1920, sec. 405, amended the second paragraph of section 3 of the Interstate Commerce Act to provide: 'All carriers engaged in the transportation of passengers or property, subject to the provisions of this act, shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines, and for the receiving, forwarding, and delivering of passengers or property to and from their several lines and those connecting therewith, and shall not discriminate in their rates, fares, and charges between such connecting lines in the distribution of traffic that is not specifically routed by the shipper.'" The provision of the law, though, is otherwise in the case of terminals and in some other respects not applicable here. It must be noted carefully that the railroad company, which is interstate in character, to wit, the Atlantic Coast Line Railroad Company, is not the resisting party, in this case, but it is only the local, or intrastate, company, the Southern Railway Company, whose line extends from Charlotte, N. C., to Goldsboro, N. C., and is therefore wholly within this State, whatever significance that may have in the decision of this appeal, which it is unnecessary to discuss now.

And again, if the respondent's contention is the correct one, then the jurisdiction of the Interstate Commerce Commission will be so extensive, and its work resulting therefrom, covering every one of the forty-eight states of this Union, will be so enormous and overwhelming as to render it utterly impossible for that Commission to perform it, so much so that it would be vain and idle to attempt it.

It is said in Fuller on Interstate Commerce, p. 100-101: "The act to regulate commerce extends to and covers all terminal facilities which, though entirely within a state, are used wholly or partly in the operations of interstate commerce. The Supreme Court has held that Congress has not so taken over the whole question of terminals, switching tracks, sidings, etc., of interstate railroads as to invalidate all state regulations relative to the interchange of traffic." And the author cites for this text, *Gr. Trunk Railway v. Mich. R. Commission,* 231 U. S., 457 (58 L. Ed.), 310, and quotes therefrom as follows: "One defense interposed was that such an order amounted to state interference with interstate commerce concerning which Congress had already legislated and that it was therefore void. The Court said: 'It is contended that the order is an interference with interstate commerce. The contention is premature if not without foundation. . . . We will not dwell on the contention of appellants that Congress has taken over the whole subject of terminals, team tracks, switching tracks, sidings, etc. We need make no other comment than it cannot be asserted as a matter of law that Congress has done so; and where the accommodation between intrastate and interstate commerce shall be made, we are not called upon to say on this record," citing *R. R. v. De Fuentes* (La. R. R. Com.), 236 U. S., 157.

It will be noticed in the Esch-Cummins Act that in withholding power from the local commission, the reference distinctly is to terminals and terminal facilities, and not to stations and station facilities, such as we have here, and this position does not conflict with the settled law in respect to interstate commerce, that where it applies, the Congress and not the state is entitled to prescribe the final and dominant rule. What we have said in this connection harmonizes with our view as to the meaning of the Esch-Cummins Act (Transportation Act of 1920) with respect to the contention impliedly advanced by the respondent, that the act has the effect to annul the judgment of our Corporation Commission, a court of record by virtue of our statute, whereas it is clear, we think, that such retrospective effect was not intended to be carried so far, but not that the Congress did not have the power to give it such an effect, which, for our present purpose, we may fully concede. This distinction is important. It is a question of construction if viewed in this aspect, and not of power, and we are admonished that an intention to give the act the effect of undoing transactions completed in the past "must appear explicitly, or by necessary implications, from the nature and language of the act, so as to leave no room for a reasonable doubt on the subject." If any such suggestion had been made in either of the legislative bodies, as we may judge, from what was said there, the act, as thus worded and intended, would not have received approval by the Congress.

We conclude, therefore, that the people of Selma, being the patrons of the two railway companies at that place, have shown themselves entitled to a better station building and station facilities at Selma, both upon the facts and by final judgment of a court of record competent, at the time, to try, and having full jurisdiction to try and pass upon the issues raised between the parties, and to render a binding judgment thereon.

The record states that there are four or more cases in different sections of the State which have pended for some time. But, as they are not before us, we refrain from expressing any authoritative opinion in regard to them, and we do not know judicially, or even otherwise, as we are not apprised, that the cases are sufficiently identical, in fact and law, for any expression of our views concerning them. If this decision furnishes any aid in their adjustment, well and good, but the settlement of them must be left strictly to the parties affected by them.

As to the contention that the Southern Railway Company is not the owner of the station at Selma, but only a lessee from the other company, we can only suggest that, nevertheless, it is its station, and so used by it, and being a lessee does not relieve the Southern Railway Company of its duty to maintain a station there, fit for the public to use, and sufficiently convenient and comfortable for such purpose. It cannot escape the performance of this plain duty by such a plea as the one set up, and if it will not perform it, it can be made to do so by order of our Corporation Commission, and the judgment of the Court, if any appeal be taken.

It will be observed upon even a casual reading of this opinion that we have laid the principal stress upon the provision of the Esch-Cummins Act (Transportation Act of 1920), confining, as we interpret it, the jurisdiction of the Interstate Commerce Commission to terminals and terminal facilities, or things to be done which are identical to the same. This of itself affirms the judgment, but we think it best and deferential to counsel who argued the case on other grounds so strenuously and zealously to consider their positions, in the Court's opinion, although we are satisfied those positions are not well taken.

In no view we are entitled to take of this case can we decide that there was any error in the well considered decision of Judge Cranmer, requiring the judgment of the Commission to be enforced by a peremptory writ of mandamus. Ordinarily, and usually, the writ is issued in its alternative form, but here we have heard the evidence and fully considered the defenses set up by the respondent in excuse for its failure to comply with said judgment of the Commission, and the alternative form of the writ, intended to give the respondent opportunity to be heard before compelling absolute obedience to the judgment and the writ, is

dispensed with, as the reason for issuing the writ in that form has ceased to exist.

It is therefore our conclusion that there was no error in the judgment of the lower court, as rendered by Judge Cranmer, and we must therefore affirm it, and as suggested in the "Selma Railway Connection Case" (*Corporation Commission v. R. R.*), 137 N. C., 1, this Court has the power, if it so elects, to enter judgment here, instead of remanding the case at the present time. It is therefore ordered that final judgment be entered here to the effect that a peremptory mandamus be issued from this Court compelling the respondents, Southern Railway Company and Atlantic Coast Line Railroad Company (by its consent and agreement), to comply at once with the judgment of the State Corporation Commission and any orders heretofore made by it in aid of said enforcement, and the said defendants (the two railroad companies) will prosecute the work of constructing said station, and in other respects as designated in the order of the Commission, with reasonable diligence until the same is finally completed. And for the present, at least, this cause will be retained in this Court for such further orders and directions as in the opinion of the Court may be required.

Affirmed.

WALKER, J. The application for a writ of *certiorari* in the above entitled cause to bring up the case, by way of appeal, from the State Corporation Commission, having been fully argued and considered by us, is hereby denied.

Motion denied.

HOKE, J., concurring: I concur in the disposition made of these appeals for the reason that, in my opinion, the recent Transportation Act referred to does not, and does not intend to, withdraw from the state commissions having charge and control of the subject the power to make adequate regulation and provision for the establishment of passenger stations for intrastate travel, assuredly so except at terminal stations where the particular order or regulation is of such magnitude as to impose a substantial burden on interstate commerce, and that fact is established and made effective by appropriate proceedings instituted before the Interstate Commerce Commission.

I am authorized to say that *Associate Justice Stacy* concurs in this view.

J. W. HULIN v. WESTERN UNION TELEGRAPH COMPANY.

(Filed 26 May, 1923.)

1. Telegraphs—Telephones—Failure to Deliver Message—Negligence—Evidence—Nonsuit—Questions for Jury—Trials.

In an action against a telegraph company to recover damages for mental anguish for failure to deliver, with reasonable promptness, a telegram announcing the death of the mother of the sender and sendee, stating the time of the funeral, there was evidence tending to show that the defendant's operator accepted the telegram, charges prepaid, to forward it over its own lines and complete the delivery by local long-distance telephone, but that the addressee had no telephone; that the operator at the point of delivery was informed that he was out of town, and without further effort to deliver, telephoned a service message to that effect, which was sent by defendant over its telegraph line to the initial point. This telephone operator testified that she would have made further effort to deliver the telegram had she been informed of its contents. After some delay, the telegram was mailed to the addressee, who received it too late to attend the funeral. There was evidence that had the telegram been mailed in a reasonable time after its receipt at destination, the addressee could and would have attended the funeral: *Held*, the defendant's motion to nonsuit, considering the evidence in the light most favorable to the plaintiff, was properly denied.

2. Appeal and Error—Verdict—Excessive Damages.

The verdict of a jury will not be disturbed on appeal to the Supreme Court as being excessive when it is not made to appear that it was the result of passion or prejudice, or clearly or grossly excessive.

APPEAL by defendant from *Finley, J.*, at December Term, 1922, of RANDOLPH.

Civil action for damages, tried upon the following issues:

"1. Did the defendant negligently fail to transmit and deliver the telegram from Troy, N. C., as alleged in the complaint? Answer: 'Yes.'

"2. Did the defendant negligently fail to deliver a service message to the sender, as alleged in the complaint? Answer: 'Yes.'

"3. What damage, if any, is the plaintiff entitled to recover of the defendant? Answer: '$1,250.'"

Judgment on the verdict for plaintiff. Defendant appealed.

Hammer & Moser for plaintiff.

J. A. Spence and Tillett & Guthrie for defendant.

STACY, J. This case was before us at the Fall Term, 1921, and is reported in 182 N. C., 541. A new trial having been granted on the first appeal, the case was tried again at the December Term, 1922, of Randolph Superior Court, and resulted in a verdict for the plaintiff as above set out. On the argument before us in the present appeal, defend-

ant relied chiefly upon its exception to the overruling of its motion for judgment as of nonsuit. Viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion of this kind, we find the following facts sufficiently established, or as reasonable inferences to be drawn from the testimony:

The telegram in question, a death message, was delivered to the defendant's agent at Troy, N. C., on 26 December, 1919, at 5:12 p. m., reading as follows: "J. W. Hulin, Denton, N. C. Mother is dead, be buried 2 o'clock tomorrow. (Signed) A. W. Hulin." The defendant, having no telegraph office at Denton, informed the sender that the message would go to Salisbury and the agent there would take it up over the long-distance telephone. Whereupon, Frank Hulin, who sent the telegram at the request of his father, A. W. Hulin, paid the agent at Troy for the telegram and for the long-distance call from Salisbury to Denton. The message reached Salisbury in about 20 minutes; 3 minutes later a long-distance call was made over the telephone by the Salisbury operator for the plaintiff at Denton. Within 5 minutes thereafter, the telephone operator at Denton reported that the plaintiff had no telephone, and that no one near him had a telephone. The importance of the message was not disclosed to the telephone operator at Denton, and, on being asked if he would have made any special effort to locate the plaintiff had he known the character of the message, replied: "I'd have tried to have located him, of course, I'd have tried. I called Johnson's store and asked if they knew where Mr. Hulin was and they said 'Wait a minute,' and they spoke back in a minute or two and said, 'They say he is out of town and no one at home.' I told that to the long-distance central. I delivered a message that he had no phone and no one near him. I made no further inquiry." Upon receipt of this information the defendant's operator at Salisbury sent the following service message to Troy: "We mail, party has no phone, no phone near him, Y. D. Hulin, Denton, N. C., signed same. D—Salisbury, N. C., 1919, 26 December, p. m. 5:42." This message reached Troy about 8 o'clock the next morning. The agent at Troy did not know where Frank Hulin or his father could be located; he knew they did not live in Troy, and for this reason he made no effort to notify them of the service message. Plaintiff received the death message at Denton through the mail about 5 p. m. on 27 December. He testified that if the Salisbury operator had mailed said message at 5:41 p. m. the day before, as he stated he did, it should have reached Denton on the morning mail in time for the plaintiff to have left Denton and attended his mother's funeral.

The evidence on behalf of the defendant was to the effect that the death message in question, being received at Troy after office hours, was

taken "subject to delay," and that every reasonable effort was made to deliver the message promptly. Plaintiff was not at his home in Denton at the time the Salisbury operator tried to locate him over the long-distance telephone, but was staying with a neighbor, some distance away. He knew that his mother was not well and he was expecting a message from his brother in regard to her condition, yet he made no effort to let the telephone operator know where he was or where he could be found. He had seen his mother on Thursday before Christmas; she was about 90 years old, and her demise was not unexpected. Plaintiff lived between 20 and 25 miles from his mother's home; and, while he had no telephone in his house, nor she in hers, yet such communication was available.

We think the evidence was sufficient to carry the case to the jury under the doctrine announced in *Barnes v. Tel. Co.*, 156 N. C., 153; *Alexander v. Tel. Co.*, 141 N. C., 75; *Carter v. Tel. Co.*, 141 N. C., 374, and cases there cited. While the jury, under all the facts and circumstances here presented, might easily have returned a verdict for the defendant, we cannot say that there is no evidence to support the finding; nor can we hold, as a matter of law, that the amount awarded is excessive. Appellate courts do not ordinarily interfere with the discretion of the jury in assessing the amount of damages, in cases of this kind, unless it appear that the verdict must have been the result of passion or prejudice, or that the amount awarded is clearly or grossly excessive. 37 Cyc., 1793, and cases collected in note. It being a question for the jury, and not for the court, to fix the amount, in cases of unliquidated damages, a verdict will not be set aside merely because it is large, or because the reviewing Court would have awarded less. 8 R. C. L., 673. See, also, opinion of *Horton, C. J.*, in *Union P. R. Co. v. Young*, 19 Kan., 488.

After a critical examination of the record, we have found no error which would justify us in disturbing the verdict and judgment; and this will be certified.

No error.

IN RE THE ADMINISTRATION OF THE ESTATE OF S. W. MARTIN, DECEASED.

(Filed 26 May, 1923.)

1. Executors and Administrators—Revocation of Letters—Procedure—Motives.

A motion upon petition to set aside letters of administration of a deceased person, before the clerk of the Superior Court who had granted them, is the proper method.

2. Appeal and Error — Executors and Administrators — Revocation of Letters—Findings—Evidence.

The findings of fact by the judge of the Superior Court upon appeal from the clerk of the Superior Court refusing to set aside letters of administration the latter had issued, are conclusive on appeal when supported by competent evidence.

3. Executors and Administrators—Domicile—Intent.

Where letters of administration are sought to be set aside for the want of domicile of the deceased in the county of the Superior Court clerk who issued them, upon the ground that the deceased had changed his domicile to another county, the physical living in the latter county by the deceased before his death, without the intent to become domiciled there, is not a change thereof that will authorize the granting of petitioner's motion.

4. Same.

Where the father of a minor son who has taken his son and his family with him to work in another county, without intent to change his domicile, and he has thereafter brought action for damages for the wrongful death in the county he had left, the motion and petition of the defendant in the action to revoke the letters of administration will be denied.

APPEAL by petitioners from *McElroy, J.*, at November Term, 1922, of YADKIN.

Petition to revoke letters of administration granted by the clerk of the Superior Court of Yadkin County to J. C. Martin as administrator of the estate of S. W. Martin, deceased. From an order affirming the judgment of the clerk, denying the petition, the petitioners have appealed to this Court.

Swink, Clement & Hutchins and O. O. Efird for petitioners.
Williams & Reavis and Johnson J. Hayes for respondent.

STACY, J. Petition and motion of P. H. Hanes Knitting Company and Dr. Wortham Wyatt to revoke letters of administration, heard on appeal from the clerk of the Superior Court, before his Honor, P. A. McElroy, at the November Term, 1922, Yadkin Superior Court. Upon competent evidence, his Honor found the following facts and embodied them in his judgment:

"1. That S. W. Martin, deceased, was a minor, and at the time of his death, 1 August, 1921, was about 18 years of age, residing with his father, J. C. Martin, with whom he resided all his life; and that at the time of his death he was living with his father at Hanes, Forsyth County, North Carolina, and the domicile of said S. W. Martin was the same as that of his father.

"2. That J. C. Martin was born and raised in Yadkin County and lived there until 1919, save and except on a few occasions when he lived

temporarily in Forsyth County, N. C., to work for wages, and always with the intention to return to his home in Yadkin County. That Yadkin County was his domicile by birth, and that J. C. Martin never abandoned his domicile in Yadkin County, but has at all times had the intention of making Yadkin County his permanent home, and when he lived outside Yadkin County he had the intention of returning to his home in Yadkin County.

"3. That during the year 1919 J. C. Martin and his family again moved to Hanes, Forsyth County, N. C., leaving a part of his household goods in their home in Yadkin County, having the intention at the time of said removal, and at all times thereafter, to return to their home in Yadkin County, and never at any time abandoned their intention to return to their said home in Yadkin County, and did not establish a domicile elsewhere.

"4. That J. C. Martin and his brother bought a small farm in Yadkin County in 1914; that since the purchase he and his brother erected a dwelling-house on this land, and it was in this house that J. C. Martin and his family, including the deceased, S. W. Martin, lived until their removal to Hanes, N. C., in February, 1919, and to which at all times he and his family, including S. W. Martin, intended to return, and to which J. C. Martin and his family did return in March, 1922.

"5. That J. C. Martin listed such personal property as he had in Forsyth County for the year 1920 for taxes in Forsyth County for said year, giving his age at 50 years; that he and his wife and daughter registered and voted in the primary and general election for the year 1920 in Forsyth County, but that said J. C. Martin, prior and subsequent thereto, repeatedly and to divers persons declared his intention to move back to his home in Yadkin County, and that he did not intend to make his home in Hanes, N. C.

"6. That in the fall of 1919 J. C. Martin and his brother purchased a team of mules with the intention of returning to his home in Yadkin County to make a crop for the year 1920, but that he and his family were stricken with influenza and thereby prevented from returning during that year; that in September, 1921, he purchased a cow from Hal Miller and left her in care of J. H. Renegar to keep for him until he came back to his home in Yadkin County, and that he did move back to his home in Yadkin County in March, 1922, where he has since resided.

"7. That the domicile of S. W. Martin at the time of his death was in Yadkin County, and at the time thereof the domicile of J. C. Martin was in Yadkin County.

"8. That neither J. C. Martin nor S. W. Martin ever abandoned their domicile in Yadkin County, and while they at times lived outside of

Yadkin County, they at all times had the intention of returning to their permanent home in Yadkin County.

"9. That S. W. Martin died intestate and letters of administration were issued to J. C. Martin by the clerk of the Superior Court of Yadkin County on 1 July, 1922; that J. C. Martin, administrator of S. W. Martin, deceased, instituted an action in the Superior Court of Yadkin County against P. H. Hanes Knitting Company, and Dr. Wortham Wyatt, the summons being issued 1 July, 1922, and served 3 July, 1922, to recover $20,000 damages of the defendants for the alleged wrongful death of S. W. Martin, deceased."

Upon the foregoing facts it was adjudged that S. W. Martin was domiciled in Yadkin County at the time of his death, and that the letters of administration issued to J. C. Martin as administrator of the estate of S. W. Martin, deceased, were properly granted by the clerk of the Superior Court of Yadkin County. Whereupon, the petition to recall or revoke said letters of administration was denied. The judgment must be affirmed under authority of our decisions.

The method here pursued in hearing and determining the motion of petitioners finds approval in the following cases: *In re Meadow's Will, ante,* 99; *In re Johnson,* 182 N. C., 522; *In re Battle,* 158 N. C., 388, and cases there cited.

The findings of fact made by the judge of the Superior Court, found as they were upon competent evidence, are conclusive on us, and we must base our judgment upon his findings, which amply sustain his order. *In re Hamilton,* 182 N. C., 44; *S. c.,* 183 N. C., 57; *Stokes v. Cogdell,* 153 N. C., 181.

Domicile is a question of fact and intention. Hence, to effect a change of domicile there must be an actual abandonment of the first domicile, coupled with an intention not to return to it, and there must be a new domicile acquired by actual residence at another place, or within another jurisdiction, coupled with the intention of making the last acquired residence a permanent home. The judge finds that no such change took place here. *Horne v. Horne,* 31 N. C., 105; *Hayes v. Hayes,* 74 Ill., 312; *Roanoke Rapids v. Patterson,* 184 N. C., 137; *Reynolds v. Cotton Mills,* 177 N. C., 415, and cases there cited.

Upon the record, the judgment must be upheld.

Affirmed.

CITY OF HENDERSONVILLE v. R. P. FREEZE.

(Filed 26 May, 1923.)

1. Municipal Corporations — Cities and Towns — Sidewalks—Streets—"Cost"—Statutes.

A charter of a city provided in separate sections for the paving of its sidewalks and streets, upon certain conditions, requiring the city to pay for grading and curbing the sidewalks and the abutting owners to pay the balance of the cost of the sidewalks; and as to the streets, the cost of paving to be charged "according to the proportion laid along the property as in case of sidewalks mentioned in the preceding section, one-third to be paid by the property owner on one side of the street, one-third by the property owner on the other side, and one-third by the city": *Held*, the cost of the "grading and curbing" to be borne by the city was confined to the sidewalks, differing from the provisions of the statute applicable to paving the streets, the latter referring to the ratio of frontage which one abutting owner bears to the street frontage of the others, and not implying that the grading of the streets shall be borne by the city "as in case of sidewalks."

2. Same—"Paving"—Words and Phrases.

Where the owners of lots abutting on city streets improved are required to pay their proportionate part of the cost under the front-foot rule for "paving," the word "pave" refers to the ratio of frontage of the abutting owners, and signifies all things necessary to and connected with the construction of a firm, convenient and suitable surface, and includes necessary preparation, such as engineering and grading, and putting down the selected materials for the completion of the work for the public use.

CONTROVERSY without action, from HENDERSON, heard by *McElroy, J.*, at chambers in Hendersonville on 16 March, 1923.

The case agreed is as follows:

1. Under and by virtue of the authority of Private Laws of 1913, ch. 352, the city of Hendersonville surveyed, excavated, guttered and curbed, storm-sewered, and laid the paving on North Third Avenue, West from Buncombe to Fleming Street, upon which the property of the defendant abuts along its eastern frontage, and guttered, curbed, excavated, storm-sewered, and surveyed Washington Street from North Fourth Avenue, West to South Second Avenue, and incidentally made repairs in the sidewalk where the above mentioned work necessitated conformation with the new improvement upon which the south frontage of the defendant's property abuts.

2. The said city of Hendersonville has charged the defendant with one-third of all the cost of the above stated work which abuts on his property, together with the pro rata cost of the intersections which were required to be paved between the terminals of the work mentioned.

3. The city of Hendersonville has assessed against the property of the defendant abutting on said aforementioned improvement one-third

of the cost of the said improvement, including therein the cost of all the items mentioned in paragraph one of this case agreed, amounting to the sum of $2,452.80, and which is divided into ten annual installments, the first of which is long since due and payable.

4. The total amount of $2,452.80 is made up of the following charges, plus interest, to wit: $1,075, cost of asphalt and stone base; combined concrete curb and gutters (consolidated with pavement), $473.88; grading, $135.96; engineering, $65.69; storm-sewer, $42.53; extra charge for three-foot strip of pavement, $51.57.

5. Private Laws of 1913, ch. 352—the charter of the city of Hendersonville—sec. 13, provides: "Whenever a majority of the property owners in any section or block of the city shall petition the commissioners in writing to pave the street along and abutting on their property, it shall be the duty of the commissioners to grant such petition and to order such paving to be made, and to charge the costs thereof according to the proportion laid along their respective properties as in the case of sidewalks above mentioned in the preceding section, one-third to be paid for by the property owner on one side of the street, one-third by the property owners on the other side of said street, and one-third by the city."

6. The property owners petitioned for the paving of the streets above set forth as provided in said above-quoted charter.

7. The provisions of the charter relating to the construction of sidewalks, referred to above, is found in section 12 of said chapter 352 of the Private Laws of 1913, and is as follows: "The commissioners shall have the power, by ordinance, or resolution to order sidewalks to be paved in the dimensions, manner, and material prescribed by such ordinance or resolution and the expense thereof to be paid by the persons whose property abuts on such proposed sidewalk, after the city at its own expense has already graded and curbed the said sidewalks; and no such sidewalk shall be ordered to be paid for by such property owners except where the sidewalk is to be in continuation of or adjoining some permanently paved sidewalk already in use and operation."

8. The defendant has refused to pay the assessments made against his property for the improvement of said streets abutting on his lots for that he contends that the city has no right under the charter as above set out to charge him with any portion of the cost of said improvement beyond the actual expense of laying the paving surface; that the guttering, curbing, surveying, incidental grading, storm-sewers, lowering of obstructing pipe lines and every other expense identical to the street improvement abutting on defendant's property is not authorized to be charged as a part of the cost of paving said streets. The defendant refuses to pay any part of the cost of said street improvement except the

actual laying of the pavement after all other necessary and incidental preliminary work has been done at the expense of the city.

9. Upon the petition of the majority of the property owners abutting on the streets above mentioned the city has paved the same, and in so doing has charged up every expense which was made necessary to the work of paving said street and without which the paving could not be put down and divided the cost as provided in section 13 of chapter 352 of the Private Laws of 1913, and the one-third cost assessed against the defendant he has refused, and still refuses, to pay for on account of the added cost of the necessary incidental work without which no pavement could be laid on the petition of the majority of the abutting property owners.

His Honor affirmed the following assessments against the defendant: asphalt and stone base, $1,075; grading, $136.96; engineering, $65.69; storm-sewer, $42.53; extra three-foot strip of pavement, $51.57; and declined to sustain the assessment of $473.88 for the combined concrete curb and gutters. Judgment was rendered against the defendant for $1,370, and interest, as provided by law. Both parties excepted and appealed.

E. W. Ewbank for plaintiff.
W. C. Rector for defendant.

DEFENDANT'S APPEAL.

ADAMS, J. The defendant admits his liability upon the assessments levied for the stone base and asphalt ($1,075), and for the three-foot strip of pavement ($51.57), but contests his liability upon the assessments for the engineering, the grading, and the storm-sewer. His exception to the judgment is based upon the contention that under the provisions of sections 12 and 13 it was incumbent upon the plaintiff to survey, excavate, and fill the street and to construct the storm-sewer at its own expense, and that the assessment against his property should not exceed his proportionate part of the cost incurred for the asphalt and stone base. As we understand the record, this position cannot be sustained. The sections referred to are distinguishable; one of them applies to sidewalks and the other to streets; and the provisions of the two differ with respect to the assessments to be charged against the property of the abutting owner. Under section 12 the city, at its own expense, must grade and curb the sidewalks; and the curbing, but not the grading, of the sidewalk is involved in this appeal. The provision in section 13—"to charge the cost thereof according to the proportion laid along their respective properties as in the case of sidewalks"—obviously refers to the proportion of frontage, or the ratio which the frontage of one

abutting owner bears to the frontage of other abutting owners, and does not imply that the grading of the streets shall be done at the expense of the city "as in the case of sidewalks."

It is equally clear, we think, that the word "pave" as used in section 13 signifies more than laying the stone base and covering it with asphalt. As a comprehensive term, it implies all things necessary to and immediately connected with the construction of a firm, convenient, and suitable surface for the use of horses, vehicles, and pedestrians, including the necessary preparation, such as engineering and grading, as well as putting down the stone, or brick, or other surface material, and thereby completing the work in the way intended for the public use. *Buell v. Buell,* 20 Iowa, 290; *Warren v. Henly,* 31 Iowa, 36; *Morse v. Westport,* 19 Mo., 831; *In re Phillips,* 60 N. Y., 16; *Heath v. Taxicab Co.,* 131 Pac., 843; *Coleman-Fulton Co. v. Arkansas Co.,* 180 S. W., 316. In our opinion each of the items charged against the defendant is a proper assessment.

Upon the defendant's appeal we find no error, and the judgment is Affirmed.

PLAINTIFF'S APPEAL.

The plaintiff excepts to the judgment because his Honor did not charge the defendant with a proportionate part of the cost of the combined concrete curb and gutters. As we have indicated, section 12 provides that the city shall grade and curb the sidewalks at its own expense. It appears that the concrete curbing of the sidewalk, the cost of which is to be paid by the city, was combined with the gutters or consolidated with the pavement and the total cost was made an indivisible item of expense, so that it is impossible to ascertain the separate cost of the curbing. Under these circumstances, in our opinion, the entire expense of the combined curbing and gutters should be borne by the city. The judgment is therefore

Affirmed.

J. V. ERSKINE ET AL. v. CHEVROLET MOTORS COMPANY ET AL.

(Filed 26 May, 1923.)

1. Contracts—Parol Evidence—Consideration—Statute of Frauds—Principal and Agent—Vendor and Purchaser.

Where the general agent of the defendant, an automobile manufacturing company, has entered into a written agreement with the plaintiffs for the sale of its automobiles within certain territory, fixing both the purchase and sales price, giving the defendant the arbitrary right of cancellation at any time, the validity of which is contested in the courts by a former agent, claiming the agency, and the general agent of defendants has

induced, by parol, the plaintiff to continue to represent it under the assurance that the machines for the sales season would be shipped according to orders placed with it, causing a large expenditure of money by plaintiff for advertising, contracts made with salesmen, etc.: *Held*, the parol agreement entered into subsequently to the written one is supported by a sufficient consideration, and is not within the statute of frauds, and is enforceable, notwithstanding the terms of cancellation expressed in the written contract previously made.

2. Contracts—Unilateral Contracts—Consideration Paid.

Where the promisee under a unilateral contract has later given a sufficient consideration for the performance of its conditions on the part of the promisor, it relates back to the time of the making of the contract, and renders the promise of the promisor obligatory on him.

3. Contracts—Breach—Vendor and Purchaser—Damages.

Where the manufacturer has fixed, by an enforceable contract of agency, both the purchase and selling price of its local agency for the sale of its automobiles, and has wrongfully breached the same, the measure of the agent's damages is the difference between the contract prices at which the automobiles were sold to him and the retail or market value at the place of delivery of the machines he would otherwise have sold.

4. Evidence—Nonsuit—Trials.

Upon defendant's motion to nonsuit, the evidence will be considered in the light most favorable to the plaintiffs, with the inferences that may reasonably be drawn therefrom.

5. Contracts—Breach—Fraud—Promise—Intent—Damages.

Where the promisor, by his representations, which he has had no intention of performing, has reasonably induced the promisee to enter into a contract, the intent of the promisor, when shown, is a fraudulent misrepresentation of a subsisting fact, and the promisee may recover such damages as resulted to him from the unlawful breach of the promisor of his obligations assumed by him under the terms of the contract.

6. Contracts—Breach—Misrepresentation—Damages.

Where the promisor has induced the promisee to enter into a contract by promises or representations upon which the latter had a right to rely, and is thereby misled to his prejudice, he may recover the resulting loss.

7. Contracts—Consideration—Time—Presumptions.

The law implies a reasonable time for the performance, duration, and completion of a contract, when not therein agreed upon by the parties.

8. Contracts—Parties—Corporations—Damages.

Upon the agreement of the parties, a contract of agency for the local sale of automobiles was made by the plaintiff with the defendant manufacturer, in the name of the plaintiff, who was later to form a corporation to act as such agent: *Held*, the plaintiff may maintain an action to recover damages for the defendant's breach, it being immaterial under the facts of this case whether the corporation had been formed or not.

APPEAL by plaintiffs from *Lane, J.*, at August Term, 1922, of BUNCOMBE.

This action was before this Court, on appeal by the defendants from an order denying the petition and motion of defendants for removal to the Federal Court, 180 N. C., 619. Defendants docketed the case in the Federal Court, and subsequently filed a bill in equity in that Court and procured an order enjoining the prosecution of this action in the State Court. Upon a hearing in the Federal Court, the injunction was vacated, and the suit dismissed. Thereupon, a consent order was entered remanding this action to the State Court, and the case was heard in the Superior Court of Buncombe County at the August Term, 1922.

The following stipulation was made by the parties in the case: It is agreed that this action was regularly and properly constituted in the Superior Court of Buncombe County, and that the summons was duly issued on 14 May, 1920, but not served, and a warrant of attachment was duly issued on the same day, and certain property in possession of the Southern Railway Company seized by the sheriff of Buncombe County thereunder, and that said warrant of attachment was discharged on 15 May, 1920, upon the defendants' entering an appearance and executing a bond in the sum of $7,500, conditioned as required by statute, and that it will not be necessary to print the summons, warrant of attachment, bond to discharge warrant of attachment, order discharging warrant of attachment, or other papers connected therewith, and which are not material for the determination of the questions involved in this appeal. Defendant, therefore, entered a general appearance and submitted to the jurisdiction of the court. *Scott v. Life Association,* 137 N. C., 515.

We deem it unnecessary to set out, *in extenso,* the contracts of the two companies, the Chevrolet Motors Company and the Chevrolet Motor Company of Atlanta, Ga., as it will suffice to state the reasons assigned by the defendants why the same are not enforceable, as this may sufficiently indicate the nature of the contracts, with the aid of the further statement below. But we will state what is tersely said by the defendants in their brief as to these contracts, and a subsequent oral contract supplementary thereto and amendatory thereof, which is as follows:

The instruments are the customary writings conferring the privilege of selling automobiles of a certain make within defined territory. There is no material difference in the two instruments. One confers the privilege in respect of the county of Henderson, and the other in respect of the city of Asheville. The plaintiffs did not rely solely upon these instruments at the trial. Their theory was that subsequent to their execution an oral agreement was made, and violated. In reviewing this judgment of nonsuit, the Court is chiefly concerned, we take it, with the inquiry whether it is permissible to deduce from the evidence, construed in a light most favorable to the plaintiffs, the inference that a binding

contract was violated. If such conclusion may reasonably be inferred, the judgment of nonsuit cannot be sustained. This was said by defendants.

In November, 1919, the individual plaintiffs were offered two agencies for the sale of the Chevrolet automobiles, trucks, and parts, one covering the counties of Buncombe, Madison, and Yancey, and to be known as that of the Erskine Motors Company, and the other covering the county of Henderson, and to be known as that of the Hendersonville Motors Company. The individual plaintiffs agreed to accept the agencies, and they were, subsequently, to form corporations under the same names "to handle the Chevrolet automobiles and trucks," and when formed M. A. Erskine was to be president and J. V. Erskine was to be secretary, and the applications and contracts were signed in the agreed names by M. A. Erskine, president, before the charters were applied for, it being fully understood that no charters had been granted, and that the corporations were in "process of organization," to handle Chevrolet automobiles and trucks, and it was so written in the application.

Articles for the incorporation of the Erskine Motors Company and Hendersonville Motors Company were prepared, and a charter was granted to the Erskine Motors Company on 9 February, 1920, but the Hendersonville Motors Company never was incorporated. The Erskine Motors Company was incorporated subsequent to the breach of contract which is the basis of this suit.

Both of the contracts are dated 1 December, 1919, and were executed in behalf of the defendant Chevrolet Motor Company of Atlanta by M. J. Herold, sales manager, and in behalf of the plaintiffs by M. A. Erskine, president. At the time the contracts were executed, and as a part thereof, the plaintiffs gave shipping order for two hundred and seven (207) automobiles and trucks covering their requirements from December to July, inclusive, the last month being the end of the season in the automobile business. These orders were taken by the agent of the defendants, and payment of machines covered thereby was guaranteed by plaintiffs.

Soon after the contracts were entered into between plaintiffs and defendant, the Chambers & Weaver Company, the former agent of the defendants, brought suit for damages on account of the agency being taken from it, and attached certain automobiles that had been shipped to plaintiffs under the contracts with plaintiffs. Plaintiffs notified the defendants of the attachment, and the attachment was discharged by defendants giving bond, and the automobiles were then delivered to plaintiffs. At that time plaintiffs were assured that they would experience no further trouble. On 18 December, 1919, M. J. Herold, the sales manager, arrived in Asheville, and expressed his regret that plaintiffs

had had trouble with the first shipment of cars, and stated that plaintiffs should not be alarmed; that the arrangement with Chambers & Weaver Company had never been satisfactory, and that the attachment was one of the things they were doing to annoy defendants. A part of the conversation, as narrated by M. A. Erskine, one of the plaintiffs, is as follows:

"Mr. Herold talked to us at great length, and then I said to Mr. Herold: 'Mr. Herold, we hear it rumored in Asheville that there is some question as to whether or not we are going to keep these contracts or not.' He, Herold, replied to me: 'Now, don't let that alarm you at all. We never had the representation in this part of the country that we should have had. We believe that after a thorough investigation that we now have the representation we are seeking, and the Chevrolet Motor Company of Atlanta has no idea of canceling your contract. The Chevrolet Motor Company is going to do everything in its power to assist you in making this business a success.' I said to him: 'Mr. Herold, we haven't invested very much money in this business up to this time. Mr. Chambers of Chambers & Weaver is a good personal friend of mine. I don't want to do anything against Mr. Chambers, and if he wants the contract and you will give it to him, I am perfectly willing to give it up.' I reached in my desk, took the contracts, handed them to Mr. Herold, and told him: 'If we are going to be bothered with law suits and controversies, here are the contracts. You can take them. We are perfectly willing to lose what little money we have already put into this, but we don't want to go ahead any further with the idea of losing the contracts or with the idea of any controversy.' Mr. Herold said to me: 'Mr. Erskine, I can assure you for the Chevrolet Motor Company that you will not lose the contracts, and that our relations with you are exactly what we have been seeking. We have investigated you thoroughly, and we are perfectly satisfied.' At that time my brother, John, spoke and said: 'Mr. Herold, that is all right; that sounds good, but suppose we have the contracts and the cars are not shipped to us—the contracts would be no good.' He, Herold, said: 'I want to assure you for the Chevrolet Motor Company of Atlanta that your contracts will not be canceled; that the cars will be shipped according to the schedule attached, and that we will take special pains in seeing that the parts you order are shipped promptly; in other words, the Chevrolet Motor Company is going to do everything in its power to make this agency a big success, and we want to coöperate with you in every way. I want to say to you for myself, personally, that I am the representative of the Chevrolet Motor Company of Atlanta, and that I will take a personal interest in your orders, and will see that everything you want is shipped to you promptly, and for the Chevrolet Motor Company,

I want to tell you that we will ship everything according to the schedule and you may rest assured that the Chevrolet Motor Company will furnish you the cars.'"

The original contracts between plaintiffs and defendants provide:

"(a) If for any reason we do not ship during the month any orders specified for that month, such unshipped or unfilled orders for that month are automatically canceled and deducted from your allotment, thus releasing you and us from further liability on such unfilled orders.

"(b) All orders hereunder are given, taken, and accepted subject to the terms and conditions hereof, and in case of the cancellation of this agreement by either party each is thereby released from any liability to the other by reason of delay in or the nonfilling or nonshipping of any order outstanding at the date of such cancellation.

"(c) Either party may cancel this agreement by five days written notice to the other.

"(d) We are to use our best endeavors to fill orders with reasonable promptness, but no liability is to attach to us for delays or nondelivery or nonfulfillment of any orders."

"(e) Deliveries of all orders are subject to contingencies beyond our control, such as fires, strikes, embargoes, inability to secure material, labor, transportations, etc."

The plaintiffs were unwilling to incur the expense of renting a garage, employing salesmen and mechanics, and advertising and making other outlays in time and money unless and until they were assured that the contracts would not be canceled during the current automobile year, and that the automobiles and trucks which they had ordered would be delivered. The Chambers & Weaver Company lawsuit, and the rumors that the agency might be taken from plaintiffs, caused plaintiffs to offer to surrender their contracts and to refuse to pay out any further amounts which would inure to the benefit of the defendants in the advertising of their automobiles, if plaintiffs might lose their profits by having the contracts canceled and by the defendants' failing to make shipment of the automobiles that had been ordered. The controversy emphasized the right of the defendants to arbitrarily cancel or to arbitrarily refuse to make shipment of automobiles under the original contracts; and plaintiffs were unwilling to go ahead unless the defendants would bind themselves not to cancel the contracts and to ship the automobiles and trucks already ordered for the months of January, February, March, April, May, June, and July, 1920. An oral contract was accordingly entered into on 18 December, 1920, whereby the defendants became bound to deliver to plaintiffs the automobiles that had been ordered by them for delivery during the first seven months of 1920, and on the faith of that contract the plaintiffs proceeded to give their time and to expend their

money in establishing their business as agents of defendants, and in advertising the automobiles and trucks manufactured by defendants.

In consequence of the oral agreement not to deprive the plaintiffs of the agency and to deliver to the plaintiffs the automobiles that had been ordered for shipment in January, February, March, April, May, June, and July, respectively, as shown by the shipping orders, plaintiffs did all in their power to make their agency a financial success for the mutual advantage of both plaintiffs and defendants.

M. A. Erskine testified: "Mr. Herold said: 'Go ahead, advertise, hire salesmen, get your advertising matter out, get your lease for your building.' We carried him out and showed him the building we were going to lease, and he said, 'Go ahead, it's fine, take it.' One of the expenditures was the temporary lease for the building occupied by McFadden; then we negotiated for a permanent lease; I do not know when that was made. We had a contract with both the newspapers for advertising space, bought office supplies and fixtures, and completed financial arrangements with the bank to take out all cars arriving; employed salesmen, agreed with my brother in regard to salary he was to receive, and made all other financial arrangements necessary for the conduct of the business. . . . I have not given you the estimate of the actual loss of real money. It was approximately $8,000, composed of salaries, expenses, rent, advertising, and general operating expenses. The actual loss in salaries was $4,000 for salesmen under contract with myself, $2,400 for services; advertising, approximately estimated, $600; insurance, approximately $300; telephone rentals, clerk hire, etc. These estimates were made from December to July, six months, as the contract loss on the cars. The contracts with the salesmen were entered into for one year. For lack of funds we were forced to cancel these contracts at the expiration of ten months, and I am estimating on that basis. Business was so good and the prospects were so good that we ordered 67 cars in addition to those that Mr. Herold, as sales manager, had agreed to ship."

The defendants fixed the purchase prices and sales prices of automobiles and trucks, and the compensation to plaintiffs was the difference between the purchase and sales price, and if the plaintiffs had received the automobiles specified in the "shipping orders" covering the months of January to July, 1920, inclusive, as agreed, the plaintiffs would have realized as gross profits thereon the sum of $29,780.21. There was a big demand for Chevrolet automobiles in the spring, summer and fall of 1920, and "there was no question but that the cars would have been sold promptly," and plaintiffs would have received the profits thereon from their customers. The market was so good that the supply of all makes was inadequate.

Defendant's manner of doing business was to ship carloads of automobiles with bills of lading therefor attached to sight drafts, and all shipments had to be paid for before delivery. After the oral contract of 18 December, 1919, was entered into, a second shipment of five automobiles was made to Asheville and delivered to plaintiffs on 23 December, 1919.

On 21 January, 1920, the defendants "arbitrarily and without reason canceled their verbal and written agreements," and refused to deliver the automobiles covered by the shipping orders, and on 2 February, 1920, the notice of cancellation was confirmed. The plaintiffs replied that they were surprised and disappointed at the action of defendants, and called attention to the fact that plaintiffs could not satisfactorily handle defendants' automobiles at Hendersonville if they were deprived of the agency at Asheville, it being fully understood that the Asheville and Hendersonville agency were to be carried on together, and that the Hendersonville agency was not profitable without the Asheville agency. Thereupon, defendants canceled their verbal and written agreements relating to the Hendersonville agency. Because of the wrongful cancellation of the oral contract, plaintiffs lost their time and approximately $8,000 in money expended by them in establishing the agencies, and had to seek financial assistance.

The defendant Chevrolet Motor Company is the parent corporation, and the Chevrolet Motor Company of Atlanta is the sales agent of the parent corporation in this territory, and Mr. Sills, the general manager of the parent corporation, in New York City, was the superior officer of Mr. Herold, the general manager of the Atlanta corporation, and plaintiffs made a statement of the facts in regard to the establishment of the Asheville agency by Mr. Herold, hoping that Mr. Sills would overrule Mr. Herold. This statement appears in the record as Exhibit "H," and was produced by defendants on the trial, and was read in part before the jury by defendants' counsel and frequently referred to in the cross-examination. It was introduced as evidence by plaintiffs. Defendants also sent a representation to New York to protest against the proposed action by Mr. Herold. In making the oral contract, Mr. Herold bound both corporations, and there was correspondence between plaintiffs and both corporations relating to the agency. Mr. Stocking, the factory representative of the parent corporation, carried on the preliminary negotiations resulting in the execution of the contracts, shipping orders, etc. P. C. Smith, supervisor of dealers for the parent corporation, made an investigation and report to them about the time defendants repudiated their contract with plaintiffs, and expressed himself as being satisfied with plaintiffs' organization. A report was made to the New York office when the agency was taken from Chambers &

Weaver Company and given to plaintiffs. After the cancellation, the parent corporation sent a check to plaintiffs on account of a deposit made with the Atlanta corporation at the time the original contracts were executed. Mr. Stocking was the factory representative of the parent corporation, and salesman of the Atlanta corporation.

At the close of plaintiffs' evidence the defendants jointly moved for judgment as of nonsuit, and the motion was allowed and judgment entered accordingly. Plaintiffs appealed.

Mark W. Brown for plaintiffs.

Merrimon, Adams & Johnston and John T. Smith and Frank A. Gaynor of New York City being of counsel for defendants.

WALKER, J., after stating the case: The plaintiffs and defendants, as plaintiffs allege, or, at least, plaintiffs and defendant Chevrolet Motor Company of Atlanta executed certain paper-writings called contracts, which were so skillfully prepared by defendants, as contended by plaintiffs, as to inveigle plaintiffs into the belief that plaintiffs would be afforded protection thereby, and that they would be warranted in incurring the great expense necessary in advertising defendants' output and in establishing agencies for defendants in the designated territory. The efforts of a competitor to take the Asheville agency from plaintiffs caused them to examine the alleged contracts, and plaintiffs then became aware that the paper-writings did not constitute contracts, if defendants' contentions proved correct, and, therefore, that they were entirely at the mercy of the defendants. *Huffman v. Page Motor Co.,* 262 Fed., 117; *Adler v. Dodge Bros.,* 237 Fed., 860; *Battle v. Smith,* 113 S. E. (Ga.), 235, 239. When the plaintiffs realized that their agencies might be taken from them by defendants, at will, they offered to surrender the contracts without incurring further expense, but the general agent of defendants refused to accept the contracts, and assured the plaintiffs that the contracts would not be canceled, and agreed that the automobiles covered by the shipping orders for the months of January to July, 1920, inclusive, would be delivered as therein ordered. It was solely on the faith of this subsequent agreement that plaintiffs went ahead and gave their time and expended large sums of money in establishing the agencies, which were expected to be mutually profitable to plaintiffs and defendants. So confident were plaintiffs in the success of their undertaking that they bound themselves to take 67 automobiles in addition to those covered by the original shipping orders.

If the original contracts (Exhibits "A" and "B") were not binding, and the oral agreement of 18 December, 1919, was the first and only contract, or if Exhibits "A" and "B" did constitute obligations which

were modified and made certain by the subsequent oral agreement of 18 December, 1919, is not material. The defendants are bound by the subsequent oral agreement of their general sales agent, whereby defendants modified the original contracts (Exhibits "A" and "B") and bound themselves to deliver the particular automobiles specified in the shipping orders, and at the time therein stated. *Lane v. Engineering Co.*, 183 N. C., 307.

The plaintiffs refused to continue as agents of defendants, and to give the time and money required for the establishment of the agencies, unless the defendants would bind themselves to deliver the particular cars ordered for the months of January to July, inclusive. The consideration moving to the plaintiffs was the profits they would receive on those particular cars, and the considerations moving to defendants were the receipt by them of prices fixed for the cars, and the advertisement of their automobiles so that the demand for their output would be greater. *Mfg. Co. v. McPhail*, 181 N. C., 205. The contract was not unilateral, a mere *nudum pactum*, but valid and binding, reciprocal duties and obligations being assumed by each side. The defendants obligated themselves to sell and the plaintiffs obligated themselves not only to buy at the prices fixed by defendants, but also to continue as agents of defendants for the sale of Chevrolet automobiles and trucks, and to rent a garage, employ mechanics and salesmen, advertise defendants' product, and to do what was necessary for the mutual advantage of the contracting parties. Approximately $8,000 was expended by plaintiffs in establishing the agencies on the faith of the oral contract. This money was paid out by direction of defendants and for the benefit of defendants, and the only consideration therefor was the agreement of the defendants to deliver the automobiles and trucks that had been ordered. Now the defendants repudiate their contract, refuse to deliver the automobiles and trucks, and insist that plaintiffs are without remedy, and that defendants can take the benefit of plaintiffs' time and money without giving anything in return. This position is one of the first impression, and is not supported by law. *Holt v. Wellons*, 163 N. C., 124. Plaintiffs contend that even if the oral agreement in controversy had been unilateral, the defendants would be bound, as they received the benefits of the consideration for which they bargained, viz.: the plaintiffs continuing as agents, and using their time and money in advertising and establishing the agencies. *Richardson v. Hardwick*, 106 U. S., 252; 27 Law Ed., 145; *Storm v. United States*, 94 U. S., 76; 24 Law Ed., 42. "If mutuality, in a broad sense, were held to be an essential element in every valid contract, in the sense that both contracting parties could sue on it, there could be no such thing as a valid unilateral or option contract, or a contract to enforce a reward, offer, or a guaranty, or in many

other instances *occurring in ordinary business affairs.* As a unilateral contract is not founded on mutual promises, the doctrine of mutuality of obligation is inapplicable to such a contract. If the promisor has received a consideration, his promise is binding, and may be termed an obligation; but as there is no promise on the part of the promisee, there can be no mutual obligations. Accordingly, where one makes a promise, conditioned upon the doing of an act by another, and the latter does that act, the contract is not void for want of mutuality, and the promisor is liable though the promisee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promisee, the contract becomes clothed with a valid consideration, which relates back and renders the promise obligatory. An option, supported by a consideration, furnishes another illustration of a contract, which is valid notwithstanding the lack of mutuality. It is no objection to the validity of the contract that the holder of the option is under no obligation to exercise it. Similarly the privilege of purchasing given a lessee, in case the lessor makes a sale of the premises, is not invalid on the ground that it is wanting in mutuality, since this privilege is part of the consideration for accepting the lease." 6 Ruling Case Law, p. 687, sec. 94. The measure of damages is the difference between the contract prices at which the automobiles were to be delivered to plaintiffs at Asheville and Hendersonville and the market value of the automobiles at those places during the period fixed by the contract for their delivery (*Jeanette Bros. Co. v. Hovey,* 113 S. E., 665, 666), or to state it differently, and with the same result, the difference between the purchase prices as fixed by defendants and the sales prices as fixed by defendants. *Hardware Co. v. Buggy Co.,* 167 N. C., 423; *Steel Co. v. Copeland,* 159 N. C., 556.

The court below held that the original contracts are void and not enforceable as contracts, and that the oral contract is not binding because it is based on those paper-writings, which are of no effect, and dismissed the action.

Plaintiffs rely upon the reported cases, which show, as they contend, that retail automobile dealers have been repeatedly victimized in relying on "written contracts" (Exhibits "A" and "B") when in fact they were without protection, and in the instant case where defendants did bind themselves by a valid and enforceable oral contract and received the benefit of the time, labor, and money expended on the faith thereof, they should be required to answer in damages for losses sustained by plaintiffs on account of its wrongful breach by defendants.

It must be clearly understood that, in these various contentions of the plaintiffs, they are not relying solely upon the original written contract, which contained the reserved powers of cancellation. It is not necessary

for us even to pause in this discussion for the purpose of considering the validity of defendants' contention that they are not, and neither of them is, liable for any breach of those contracts, for if there is such liability arising out of the subsequent oral agreement with Mr. Herold, as general agent of the companies, it is quite sufficient to dispose of the case adversely to the defendants' contention, for we are now dealing with a nonsuit; and the evidence must be taken in the most favorable view for the plaintiffs; and, furthermore, they are entitled to have us adopt, and act upon, any reasonable inference to be drawn from the evidence treated in that favorable light for them. No one shall be enriched by making another poor. If defendants received a benefit by reason of the services rendered by the plaintiffs, under a contract between them which defendants afterwards repudiated, or refused for any reason to perform, the plaintiffs may not recover on the special contract, because of its express terms, but the defendants cannot retain any benefit they have received and at the same time deny liability and refuse to pay anything, for this would be rank injustice, as said by the Court in *Manhattan Life Ins. Co. v. Buck*, 93 U. S., 24. This Court said, in *Gorman v. Bellamy*, 82 N. C., 496: "The inclination of the courts is to relax the stringent rules of the common law which allow no recovery upon a special unperformed contract itself, nor for the value of the work done, because the special excludes an implied contract to pay. In such case, if the party has derived any benefit from the labor done, it would be unjust to allow him to retain that without paying anything. 'The law, therefore, implies a promise,' say the Court, 'to pay such remuneration as the benefit conferred is really worth,'" citing *Dumott v. Jones*, 23 How. (U. S.), 220; *Monroe v. Phelps*, 8 Ellis & Black, 739. The same principle has since been frequently approved and applied in other cases by this Court.

Commenting on the *Manhattan case, supra*, Mr. Keener, in his excellent treatise on Quasi-Contracts (Ed. of 1893), p. 247, says: "Now it is submitted that no distinction can be drawn between *Cutter v. Powell*, 6 T. R., 320, and *Manhattan Life Ins. Co. v. Buck*, 93 U. S., 24. In each case there was an express condition to the effect that in the event in question the plaintiff should have no claim upon the defendant; in each case it is conceded that the plaintiff had no rights against the defendant on the contract itself. But by the terms of the contract, which provided that the plaintiff should have no rights on the contract in the event which has happened, it was distinctly stated in the case of *Manhattan Life Ins. Co. v. Buck, supra*, that the plaintiff was to have no rights of any kind against the defendant. If, then, the case of the *Manhattan Life Ins. Co. v. Buck, supra*, is to be supported, it must be put upon the ground that the court will relieve against a forfeiture, and

will therefore disregard a clause of the kind found in the policy. But if the court will disregard such a clause in favor of a plaintiff who had paid money, the same court should certainly disregard the clause in favor of a plaintiff who has rendered services, since in the one case as much as in the other the defendant has received from the plaintiff that for which he has not given the plaintiff an equivalent."

But it is not necessary that we adopt either of these views in the present instance, as the oral contract with Herold, the general agent or manager, so modifies the written contracts by eliminating the provisions as to cancellation, and in other respects, and his representations, promissory or otherwise, were of such a persuasive and tempting character, as to create a cause of action in favor of the plaintiffs, of quite a different kind from that which arose, if at all, upon the special written contract. To say the least of it, the language, conduct, and manner of Herold was calculated to impress the plaintiffs to believe that they could safely go ahead with their projected scheme as agents or distributors of defendants' cars and other vehicles, with the assured, and even warranted, expectation that the defendants would comply with their orders promptly and assist them in every way to success in their venture, which was to inure more to their benefit than to that of the plaintiffs. Stronger or more effective inducement could not have been held out to the latter, or have encouraged them in the belief, and even conviction, that they could safely make the anticipated expenditures in installing and equipping their plant at Asheville and Hendersonville upon the assurance of the defendants that they would get their money back thus laid out, and realize a substantial profit from the enterprise. If we should hold that plaintiffs have no legal right to be reimbursed for their outlay, under such circumstances, and to recover their reasonable and certain profit thus promised to them, would be to disregard all well settled principles of the law in like cases.

If one makes a promise to another which at the time of making it he does not intend to perform, and induces the latter thereby to part with value, or to act to his own prejudice, he will be liable for the consequent damages to him who is thus misled by the false promise. It has been held by us that in cases of fraud, where the person committing it has been thereby enriched to the damage or detriment of the other, an innocent party, *indebitatus assumpsit* will lie upon the ground that the law implies a promise to restore what has been gained by the transaction. *Armfield Co. v. Saleeby,* 178 N. C., 298; 6 S. E. Digest, 866. Another well established species of fraud by a vendee is purchasing with a positive intention not to pay for the goods. If such intention were known to the vendor he certainly would not sell. Its suppression, therefore, is a legal fraud. Benjamin on Sales (7 ed.), p. 470; *Des Farges v.*

Pugh, 93 N. C., 31; *Wallace v. Cohen*, 111 N. C., 103; *Donaldson v. Farwell*, 93 U. S., 631; *Stewart v. Emerson*, 52 N. H., 301. The case of *Rudisill v. Whitener*, 146 N. C., 403, approved the principle as stated. In Bigelow on Fraud it is said that, according to the current of authority, a debt is created by fraud where one intending at the outset not to pay for property induces the owner to sell it to him on credit by falsely representing or causing the owner to believe that he intends to pay for it, or by concealing the intent not to pay. A false and fraudulent representation or promise we understand to be one made with the intention in the mind of the promissor not to perform the promise. This is the misrepresentation of a subsisting fact, false within the knowledge of the party making it, and calculated to deceive. Speaking of an actionable fraud, *Lord Bowen*, in *Edington v. Fitzmaurice*, 29 L. R. Chan. Div., 459, says: "There must be a misrepresentation of a subsisting fact; but the state of a man's mind is as much a fact as the state of his digestion. It is true that it is difficult to prove what the state of a man's mind at a particular time is, but if it can be ascertained, it is as much a fact as anything else. A misstatement as to the state of a man's mind is therefore a misstatement of a fact." *Hill v. Gettys*, 135 N. C., 373, 375. *Justice Ashe* said in *Des Farges v. Pugh*, *supra*: "It matters not by what means the deception is practiced—whether by signs, by words, by silence, or by acts—provided that it actually produced a false and injurious impression of such a nature that it may reasonably be supposed that, but for such deception, the vendor might never have entered into the contract." A promise is usually without the domain of the law unless it creates a contract, but if made, when there is no intention of performance, and for the purpose of inducing action by another, it is fraudulent, and may be made the ground of relief. *Hill v. Gettys*, 135 N. C., 375; *Braddy v. Elliott*, 146 N. C., 582. In the *Hill case*, *supra*, the Court ordered the cancellation of a mortgage because of a fraudulent promise, and in the opinion quotes with approval the following excerpts from text-books and decisions: "The general rule in regard to promises is that they are without the domain of the law unless they create a contract, breach of which gives to the injured party simply a right of action for damages, and not a right to treat the other party as guilty of a fraud. But that proceeds upon the ground that to fail to perform a promise is no indication that there was fraud in the transaction. There may, however, have been fraud in it, and this fraud may have consisted in making a promise with intent not to perform it. To profess an intent to do or not to do, when the party intends the contrary, is as clear a case of misrepresentation and of fraud as could be made." *Herndon v. R. R.*, 161 N. C., 650-656; *Williams v. Hedgepeth*, 184 N. C., 114; *Trust Co. v. Yelverton*, *ante*, 314. A

promise is a solemn affirmation of the intention as to a present fact. 1 Bigelow on Fraud, 484 (the author is discussing, of course, civil remedies). "When a promise is made with no intention of performing it, and for the very purpose of accomplishing a fraud, it is a most apt and effectual means to that end, and the victim has a remedy by action or defense." *Goodwin v. Horne,* 60 N. H., 485. "The intent is always a question for the jury, and to determine whether the intent was fraudulent the jury have necessarily to look to the circumstances connected with the transaction or those immediately preceding or following it." *Des Farges v. Pugh, supra.* This important question was fully considered in *Massey v. Alston,* 173 N. C., 215, and the principal authorities examined and cited by the Court. Mr. Bispham in his work on Equity (9 ed.), 211, deals with the subject from the standpoint of equity, and says regarding it: "The representation must not be an expression of intention merely. A man has no right to rely upon what another says he intends to do unless, indeed, the expression of intention assumes such a shape that it amounts to a contract, when, of course, the party will be bound by his engagement and for the breach of which the other side has, ordinarily, an adequate remedy at law. But if a promise is made with no intent to perform it, and merely with a fraudulent design to induce action under an erroneous belief, or if a representation amounts to a statement of fact, although dependent upon future action, in either case there is ground for equitable relief." Referring to that passage, it is said in *Massey v. Alston, supra,* that "Mr. Bispham is fully sustained in this view by the authorities he cites. As we are told by moralists and jurists, words are to be taken by courts of justice in the sense which it was intended they should be, and which those using them wished and believed that they would be understood by him to whom they are addressed, and the latter has the right to accept and act upon them as having such a meaning. The intention that he should thus understand them, and govern himself accordingly in his business intercourse with another who used them, is what gives a right to relief if it turns out that they are false, and if they induce the other party to act to his prejudice, relying upon the truth of what is said, in accordance with a fair and reasonable interpretation of the words. "If defendant said (as in *Massey v. Alston, supra*), that he would pay at once, or immediately, if the deed was delivered to him, and he had no intention of keeping his promise, and no ability to do so, as appeared in that case, and he made the false statement, dishonestly and for the the purpose of getting possession of the deed, and thereby overreaching the plaintiff, knowing that plaintiff was trusting in his promise and its strict fulfillment, and gave up the deed because he did so confide in the defendant's integrity and in the belief that he would do exactly what he had prom-

ised, we cannot see why this is not such a false representation as would entitle the plaintiff to relief. And the great weight of authority is to this effect."

Let us now apply these principles to the case in hand. If the defendants, acting through their general agent, having authority to bind the principals, represented what they would do, not intending at the time to do and perform what was promised, and thereby induced plaintiffs, relying on his statement, so to act as to bring loss upon themselves, if the promises and representations as to what would be done were falsely made, and were not carried out, and not intended to be executed, and plaintiffs were thereby made to suffer loss, the wrong was an actionable one, and they may recover for the loss or injury resulting therefrom. Both law and equity will afford relief in proper cases.

Of if the defendants, by themselves or their duly authorized agent, made promises or representations, upon which the plaintiffs had the right to rely, and they were misled thereby to their prejudice, they may recover the resulting loss.

The defendants further contend that there is no mutuality, as between the parties to the contract, which they say means no consideration to support it as an enforceable agreement. But there is such consideration, it being the benefit and advantage defendants were to receive from the wide advertisement and sale of their cars, and from other advantages, which they were so keenly anxious to reap, as their agent intimated, and furthermore, as a part of the consideration, they were to have the services, efforts, and expenditures of the plaintiffs in that behalf. What more would they want or could they require? Besides all this, there was mutuality and consideration sufficient to uphold the contract, as defendants were not only to lay out large sums of money in preparation for the fulfillment of their agency to sell the defendant's cars, but were to pay the scheduled prices, or in default of that, the reasonable prices of the defendants for the same. It must be kept in mind that plaintiffs are not relying altogether upon the written contracts, as amended subsequently, but upon the oral representations and promises of the defendants, by which they were deceived and thereby lost. Plaintiffs were to pay the list prices, subject to changes of the same according to the rise or fall of prices in the market, but still they were to pay. The cars were to be shipped "according to schedule attached," and Herold said, with impressive words and manner, "We will take special pains in seeing that what you order is shipped promptly, and the company agrees, through me, to do everything, in its power, that will make this agency a big success, and we will coöperate with you in every way to that end." These were not only impressive words, but calculated to inspire the plaintiffs with confidence in their truth, and sincerity, and to induce

a free expenditure of their money and effort in producing the desired and promised result.

Where no time is fixed, if it is not fixed here, for the performance, duration, and completion of the contract, the law implies that a reasonable time will be allowed. *Winders v. Hill,* 141 N. C., 694; *Michael v. Foil,* 100 N. C., 178; *Bunch v. Lumber Co.,* 134 N. C., 116; *Waddell v. Reddick,* 24 N. C., 424.

The orders for cars were given by plaintiffs in reliance upon the representations and promises of Herold, the defendants' general agent, and not necessarily upon the written contracts, unmodified by the oral agreement, or even as modified by it, as there are considerations, independent of the written agreements, upon which the oral agreement may well rest.

The agreement is not affected by the statute of frauds, the two cases relied on by defendants for the suggestion as to the statute, viz., *W. City Fire Ins. Co. v. Lichtenstein,* 181 App. Div. (N. Y.), 681, 685; *Pearlberg v. Levischn,* 112 Misc. (N. Y.), 95, were both decided in New York, the statute of that State and ours being essentially different as to contracts not to be performed within a year, and in other respects.

The position that the contracts were executed in the name of the plaintiffs as individuals seems to be untenable, if not trivial, the intention manifestly being that the plaintiffs should act individually until their incorporation. This objection is more technical and formal than substantial. It does not prejudice the defendants materially that the incorporation of plaintiffs has been delayed. It may be that the incorporation might take place now, and the corporations made parties, as successors to the individual plaintiffs. We do not see how the merits of the transaction will be materially affected either way. The Code provides, Pell's Revisal, sec. 415: "No action shall abate by the death, marriage, or other disability of a party, or by the transfer of any interest therein, if the cause of action survive or continue, but the Court, on motion at any time within one year thereafter, or afterwards on a supplemental complaint, may allow the action to be continued by or against his representative or successor in interest." It is plainly evident that this contention must have been an afterthought of the defendants, and not the substantial reason for the failure to comply with their contracts.

We have thus carefully considered all reasonable grounds of objection set up by the defendants, and find none of them to be tenable. The rulings of the Court are consequently reversed, and the nonsuit is set aside. This necessitates the calling of a jury to try the case.

New trial.

ADAMS, J. This opinion was written by MR. JUSTICE WALKER in accordance with the decision of the Court, and was filed after his death.

R. L. DAVIES & COMPANY v. JACK L. BLOMBERG.

(Filed 26 May, 1923.)

1. Pleadings—Demurrer.

The office of a demurrer is to determine the legal sufficiency of a pleading, and for the purpose admits the truth of the matters and things alleged therein.

2. Bankruptcy—Secured Claims—Proof of Claims—Composition—Waiver.

The holder of a mechanics' lien, who afterwards proves his entire claim as a secured creditor, does not waive his security, but if he proves as an unsecured creditor in the bankruptcy proceedings of his debtor, attends and participates in the meetings, and accepts his proportionate part of a composition of creditors effected under the provisions of the bankrupt act, or a dividend therein, as a general rule he places himself on a parity with the general creditors, and is deemed to have waived his security. *Walters v. Hedgepeth*, 172 N. C., 310, with regard to a lien on the bankrupt's homestead, cited and distinguished.

APPEAL by defendant from *Lane, J.*, at October Term, 1922, of BUNCOMBE.

Civil action for debt and to enforce a mechanic's lien against defendant's leasehold estate. Defendant set up in bar of plaintiff's right to recover or to enforce its lien a composition in bankruptcy—it being alleged that plaintiff participated fully in the bankruptcy proceedings, filed its claim as an unsecured creditor, and took part in all meetings of the creditors; that a 25 per cent composition was offered by the defendant and accepted by a majority in number and in amount of the creditors whose claims had been filed and allowed, and that this was confirmed by the District Court of the United States. Plaintiff demurred to the sufficiency of the answer and moved to strike out all the allegations in regard to the bankruptcy proceedings. Demurrer sustained, motion allowed, and defendant appealed.

J. Y. Jordan, Jr., for plaintiff.
Harkins & Van Winkle and Mark W. Brown for defendant.

STACY, J. The office of a demurrer is to determine the legal sufficiency of a pleading, admitting for the purpose the truth of all the matters and things alleged therein. 21 R. C. L., 504. It is alleged in the answer that on 10 February, 1922, the defendant filed a voluntary petition in bankruptcy in the District Court of the United States for the Western District of North Carolina, and listed plaintiff's claim as one of his unsecured debts; that the plaintiff duly filed proof of its claim for the full amount, as an unsecured creditor in said bankruptcy court, and participated in all the creditors' meetings, took part in the election of a

trustee, voted its full claim as an unsecured debt, and was present, participating when the bankrupt's 25 per cent offer of composition was accepted by the requisite majority of creditors in number and amount. Under these facts it is alleged that plaintiff is deemed to have waived or relinquished any security or lien which it may have held, and that the order of confirmation was tantamount to a discharge in bankruptcy. Black on Bankruptcy, sec. 562; Bankruptcy Act (1898), sec. 14 (c).

We think the demurrer should be overruled, and the defendant allowed to show his defense, if he can. A secured creditor does not waive his security by proving his debt in the bankruptcy proceedings, if he prove it as a secured claim. But, as a general rule, if a creditor prove the whole of his claim as unsecured, and particularly if he accept a composition or a dividend thereon, he places himself on a parity with all the general creditors, and is deemed to have waived his security. *In re Burr Mfg. and Sup. Co.,* 217 Fed., 16. It will be observed that in *Watters v. Hedgpeth,* 172 N. C., 310, plaintiff's lien there was on the bankrupt's homestead, which property was beyond the power of the bankruptcy court to administer, as it was exempt under the Constitution of this State, and nothing was paid to the creditors in the bankruptcy proceedings. *Lockwood v. Bank,* 190 U. S., 294; *McKenney v. Cheney,* 118 Ala., 387; *Birmingham Finance Co. v. Chisolm,* 284 Fed., 840; U. S. Comp. St. (1918), sec. 9590.

We refrain from further comment, as the evidence in the case may show a different state of facts from that alleged in the answer.

The ruling of his Honor in sustaining the demurrer and striking out all the allegations in defendant's answer, relating to the bankruptcy proceedings, must be reversed and the cause remanded for further action, not inconsistent with this opinion.

Reversed.

B. F. TISDALE, ADMINISTRATOR, v. UNION TANNING COMPANY.

(Filed 26 May, 1923.)

1. Employer and Employee—Master and Servant—Safe Place to Work—Negligence—Evidence—Nonsuit—Trials.

It is the duty of the employer to furnish his employee at a power-driven plant a reasonably safe place to work and proper tools and appliances to do the work required of him; and evidence tending to show that the employee had his clothes caught in a bolt in the coupling of a swiftly revolving shaft, left projecting one-half inch beyond the coupling flange, not countersunk or protected, as he was returning from opening a window to let in air, according to the custom of employees in the mill, and in the

only way provided, thus causing his death, is sufficient to take the case to the jury upon the issue of defendant's actionable negligence, upon his motion as of nonsuit.

2. Employer and Employee—Negligence—Assumption of Risk—Evidence—Nonsuit—Trials.

Where the actionable negligence of the defendant is the proximate cause of the employee's injury, resulting in his death, the doctrine of assumption of risk does not bar the plaintiff's recovery. This and contributory negligence being matters of defense are not available to defendant in his motion as of nonsuit upon the evidence.

APPEAL by plaintiff from *McElroy, J.*, at January Term, 1923, of McDOWELL.

This is an action for damages for the negligent killing of plaintiff's intestate, Arthur Allison. He was working for the defendant tanning company at the time of his death, 29 January, 1920, assisting in the operation of a machine called a "drum dryer," into which machine liquid extract is poured and in which are two revolving drums heated from within so that in forty minutes from the time the extract is poured into the drum it is as dry as powder. It was in evidence that "from the south side of the machine to the south side of the building there was a space from 10 to 12, possibly 15, feet, and the line shaft was about three feet from the side of the building on the south, and there were windows along the wall on that side as well as on the other side of the building, possibly 6 or 8 on that side."

The witness further testified that between the drum dryer and the window, and about three feet from this wall, was a line shaft which extended through the building; the sections of this shaft were joined by couplings which were about 12 inches in diameter, disk-shaped and flanged, fastened together by bolts extending clear through them; the heads of the bolts were towards the west end of the building and the threaded ends towards the east. There were five or six bolts which held the disks together. One of these bolts, where the deceased was killed by his clothing being caught by it, was longer than the others and extended out about one-half inch beyond the others and on out past the flange. The end of this bolt was threaded and the threaded end projected about one-half inch beyond the tap. This particular coupling, through which this long bolt was placed, was almost directly in line with the window which had been opened during witness's absence from the building and in line with the drum dryer. The witness Allison, whom plaintiff's intestate was assisting, left the building to go over to the superintendent's office, telling deceased to watch the machine while he was away. The death of deceased occurred while the witness was at the business office. Upon his return he found young Allison dead, or practically so, lying under the line shaft near this coupling, his clothes being

wound around the line shaft and along it from the coupling back perhaps 15 to 18 inches, and the window opposite the coupling was open. This witness testified that it was the general custom which had existed as long as he had been working there of going over or under the shaft to raise or lower the windows. It was also in evidence that this was a warm day in January.

A. B. Setzer, another witness, testified in substance to the same facts as the above witness. He testified also to the long established general custom of going over or under the shaft by employees at will, to open or close the windows on the south side of the building. He testified that one set screw in this coupling was longer than the others, and extended out beyond the flange. Other witnesses testified in substance to the same facts, and all state that the custom existed and had existed ever since they had been working at the place, of going beyond the guard rail and line shaft to open the windows. There was no other way of getting to any of these windows to open them.

There was a wooden railing a few feet inside of the line shaft, towards the center of the building, but there was no railing between the line shaft and the windows on the south side of the building. Upon the evidence, the court directed a nonsuit, and the plaintiff appealed.

Hudgins, Watson & Washburn for plaintiff.
Pless, Winborne & Pless and W. T. Morgan for defendant.

CLARK, C. J. No one witnessed the actual death of the plaintiff's intestate, but the facts are very simple. It was the duty of the defendant to give his employees a reasonably safe place in which to work. The building was a tannery, and there was a long line of shafting, inside of which there was a wooden railing, which would be a protection to the public and others than employees who were not called upon to go near the machinery. Between this line shafting and the windows there was a three-foot space, and the evidence is that it had been customary for the employees, when they desired or found it necessary to open a window, to go over or under this line shaft as the only means of doing so. From the nature of the business this was a super-heated building, and in addition this was quite a warm day. The shafting was connected by couplings, and through every coupling there were five or six heavy bolts. The employee, as whose assistant the plaintiff's intestate was working, was called off to the business office leaving the plaintiff's intestate in charge. When he returned the window opposite this coupling was open and the deceased was found lying under the coupling with most of his clothing torn off and wrapped around the shafting, and there were indications that this clothing had been caught by an unprotected set screw in the coupling plates which projected beyond its tap.

The plaintiff contends that this was evidence taken in its most favorable light for the plaintiff, which must be done on a nonsuit, to show negligence on the part of the company. There was evidence that it was customary to raise this window from time to time, and that it had been customary, and indeed the only way for the employees to do so was to pass over the line shafting, or dodge under it, to get to the window, and it was evidence to go to the jury that this screw projected a half-inch beyond the tap whereby it is quite clear from the other evidence that the clothing of the deceased was caught and pulled off of him, and the deceased being thus caught was slowly revolved around the shafting, as one of the witnesses stated, until he dropped from it and was found lying dead or dying on the floor.

This Court has repeatedly held that it is negligence for the employer using rapidly revolving shafting to leave the point of the screws, or the taps, exposed, which may thus catch in the clothing of those nearby, exposing employees like the plaintiff's intestate to such danger. In all such cases ordinary prudence requires, as this Court has often held, that the point of the screw and the taps should either be countersunk or protected by a cup or some other similar device which will not catch in the clothing of the employee and drag him to his death. This is such a simple protection that an ordinary regard for the safety of the employees imperatively requires this to be done.

This screw point of a large screw holding the coupling together passing a half-inch beyond the tap readily would catch in the clothing of the deceased in returning from the window which he had opened and there was no other way for him to go to, or return from, the window except over or under this shafting, and the evidence is uncontradicted that it had always been the custom for the employees to go over, or under, this shafting to get to the window. The window was there to be opened, and was very often opened, and the defendant company not having provided any other way to reach the window except over or under the shafting, should have safeguarded the points of the bolts that were likely to catch in the clothing of the employee thus engaged, either by countersinking the point of the bolt, or if this was impracticable, by putting a cup over it or other protection.

If it be conceded that there was a rule of the company forbidding an employee to go over or under the shafting, still the evidence is that such rule had been habitually violated to the knowledge of the employer. In *Biles v. R. R.*, 139 N. C., 528, it is held: "Where a rule is habitually violated to the knowledge of the employer, or where a rule has been violated so frequently and openly and for a length of time that the employer should by the exercise of ordinary care have ascertained its nonobservance, the rule is considered as waived or abrogated."

In *Smith v. R. R.*, 147 N. C., 603, the Court said: "The law is that the violation of a known rule of the company made for an employee's protection and safety, when the proximate cause of such employee's injury, will usually bar a recovery. This is only true, however, of a rule which is alive and in force and does not obtain where a rule is habitually violated, to the knowledge of the employer, or those who stand towards the employer in the position of vice-principal, or when a rule has been violated so frequently and openly and for a length of time that the employer by the use of ordinary care could have ascertained its nonobservance." To the same purport, *Haynes v. R. R.*, 143 N. C., 154; *Bordeaux v. R. R.*, 150 N. C., 528, and the authorities to the above effect are numerous and uniform.

The operation of the tannery necessarily super-heated the building. The windows were there to be opened; there was no means for the employees to get to the windows for that purpose except by going under or over the line shafting, and the evidence was that this was constantly done by the employees.

Permitting the operation of a rapidly revolving line shaft with the threaded end of a bolt projecting out beyond the flange so that it might come in contact with the person or clothing of an employee in going to or from the window, there being no other method of opening the window, was negligence, and made the employer liable for any injury of which it was the proximate cause. Permitting a threaded bolt to be longer than the other bolts and extend out beyond the surface of the flange was negligence.

In *Eplee v. R. R.*, 155 N. C., 293, it was held that where a power drill, for boring holes in iron plates, left exposed set screws therein which were dangerous when the drill was being operated, these set screws should be, and usually are, covered or countersunk, and if this precaution is not taken it is not a proper tool to be used, and the master is liable. That case cites many others to the same effect that it is negligence for the employer to leave set screws unprotected, and not to countersink or protect set screws used in machinery. To this purport it was held in *Pressly v. Yarn Mills*, 138 N. C., 413, that if there is any negligent default in this or similar respects, and this negligence was the proximate cause of the injury, the first issue should be answered in the affirmative, and that assumption of risk is not a defense. Even if it were, assumption of risk and contributory negligence are defenses, and a nonsuit cannot be granted when, as in this case, there is prima facie evidence of negligence on the part of the employer. To the same purport are very numerous cases, among them, *Sims v. Lindsay*, 122 N. C., 681, where there was not a sufficient guard upon the machine which could be and was used on other machinery, and the nonsuit was set aside. See the

numerous annotations to that case in the Anno. Ed. See, also, *Hicks v. Mfg. Co.*, 138 N. C., 319, in which *Hoke, J.*, lays down the same ruling. *Lloyd v. Hanes*, 126 N. C., 359; *Womble v. Grocery Co., (Connor, J.)*, 135 N. C., 474; *Ross v. Cotton Mills*, 140 N. C., 115; *Horton v. R. R.*, 145 N. C., 138, citing *Hoke, J.*, in *Fitzgerald v. R. R.*, 141 N. C., 530.

The defendant contends that the intestate was guilty of contributory negligence or assumption of risk, but these, as already stated, and as said in the authorities above quoted, were matters of defense for which the court could not grant a nonsuit.

In this case there was sufficient evidence which entitled the plaintiff to have the case submitted to the jury. For the error stated, there must be a

New trial.

C. C. HUDSON v. CITY OF GREENSBORO. SOUTHERN RAILWAY COMPANY, NORTH CAROLINA RAILROAD COMPANY, AND GREENSBORO BANK AND TRUST COMPANY.

(Filed 26 May, 1923.)

1. **Constitutional Law — Municipal Corporations — Cities and Towns — Statutes—Depots—Railroads—Bonds—Taxation—Contracts—Trusts.**

A statute authorizing a city to issue its bonds and lend the proceeds of their sale to a railroad company to build a depot within its limits, when the question has been submitted to and approved by its voters, does not contravene the State Constitution, and is valid: as in this case, a bond issue by the city for the purpose and in full conformity with the provisions of the statute, running thirty years at not exceeding 6 per cent interest, under contract with the railroad company for the latter to convey all of its depot and track lands within the city to a trustee in trust, to be reconveyed to the railroad company upon its performance of the terms of the contract, and requiring the railroad company by maintaining a sinking fund to discharge the debt at maturity, with accrued interest, take care of the necessary repairs, and pay the taxes upon the property.

2. **Same—Public Interests—Courts—Legislative Discretion—Contracts—Consideration.**

Upon the facts appearing of record on this appeal, *it is held* that the benefits that are expected to accrue to the city by the building and maintenance of a depot is within the scope of the public interest, for a public purpose, and is a valid consideration for the contract, and the question as to its effect upon the financial condition of the city in the uncertain future is one solely addressed to the discretion of the legislative branch of the State Government, and to the city acting in accordance therewith, with which the courts may not interfere.

APPEAL by plaintiff from *Harding, J.*, at April Term, 1923, of GUILFORD.

This was a proceeding to obtain an injunction against the city of Greensboro carrying out its contract with the Southern Railway Com-

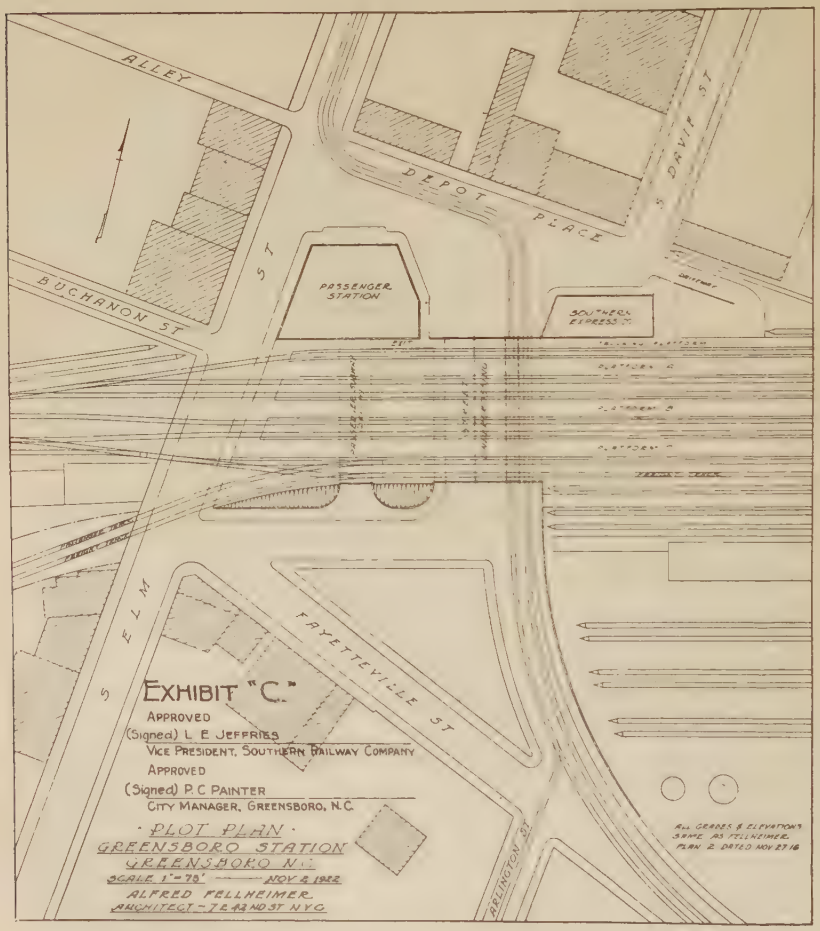
pany to issue $1,300,000 in bonds for the purpose of loaning the same to the Southern Railway Company for the construction of a passenger station at Greensboro and an underpass, etc.

The General Assembly of North Carolina, at the Extra Session of 1920, passed an act, Private Laws, ch. 105, ratified 23 August, 1920, which authorized the city of Greensboro to issue bonds not to exceed $1,300,000, the proceeds of which were to be loaned for the construction of a station building, an underpass, etc., by the Southern Railway Company in accordance with plans to be agreed upon between the city and the company, the bonds to mature thirty years from date bearing not to exceed 6 per cent interest. The act further provided that the governing board of the city should call an election to submit the proposed contract and the question of the issue of the bonds as aforesaid to the qualified voters of the city, and that, if approved, the railroad company was to convey the necessary land free of all encumbrance to a trustee, to be held until the Southern Railway Company should, by monthly rentals, have paid the said trustee a sum of money sufficient to take care of the interest on the bonds issued for the purpose aforesaid and to provide a sinking fund to discharge all of said debt at maturity with accrued interest, and the railroad company was required to take care of the necessary repairs and pay taxes upon the property and upon the repayment of the sum advanced by the city, the trustee should reconvey the property to the railroad company.

On 11 April, 1922, an election was held in which the qualified voters of the city of Greensboro approved the proposed contract and authorized the issuing of the bonds and carrying out of the contract. It appears from the record that the number of qualified voters at said election was 3,428, of whom 2,145 voted to approve the action aforesaid, and 271 voted against it. The contract thus proposed and authorized was executed 12 February, 1923, and the construction work would have been commenced but for the intervention of the proceedings in this case. The Southern Railway Company has secured releases from the trustees in the four deeds of trust covering the property proposed to be released, and also a conveyance from its lessor, the North Carolina Railroad Company.

The court finds as a fact that no conveyance of title has yet been executed to the said Southern Railway Company, nor to the Greensboro Bank and Trust Company as trustee, by virtue of the aforesaid contract, but that it would have been executed and delivered but for the institution of this suit.

The following is the contract of the parties, and the act of the Legislature under which the contract was made and submitted to the people, the proceedings of the city council and the return of the election thereon and the map of the premises:


ALLEY
DEPOT PLACE
S DAVIE ST
BUCHANON ST
S ST
PASSENGER STATION
SOUTHERN EXPRESS Co.
S ELM
FAYETTEVILLE ST
ARLINGTON ST
EXHIBIT "C."
APPROVED
(Signed) L. E. JEFFRIES
VICE PRESIDENT, SOUTHERN RAILWAY COMPANY
APPROVED
(Signed) P. C. PAINTER
CITY MANAGER, GREENSBORO, N.C.
PLOT PLAN
GREENSBORO STATION
GREENSBORO N.C.
SCALE 1"=70' NOV 6 1922
ALFRED FELLHEIMER
ARCHITECT - 7 E 42 ND ST N.Y.C.
ALL GRADES & ELEVATIONS SAME AS FELLHEIMER PLAN 2 DATED NOV 27 '16

AGREEMENT.

An agreement, made and entered into this 12 February, 1923, by and between city of Greensboro, a municipal corporation, organized and existing under and by virtue of the laws of the State of North Carolina, hereinafter for convenience styled "City," and Southern Railway Company, a corporation, organized and existing under and by virtue of the laws of the State of Virginia, qualified to engage in the business of common carrier in the State of North Carolina, hereinafter for convenience styled "railway company," and Greensboro Bank and Trust Company, a corporation, organized and existing under the laws of the State of North Carolina, hereinafter for convenience styled "trustee."

Witnesseth, That whereas the city desires to promote the general good, convenience, and safety of its citizens by constructing in the city of Greensboro, N. C., a passenger station, together with all necessary appurtenances thereto, and in connection therewith a certain underpass eliminating a dangerous grade crossing, all as more particularly hereinafter identified, which will promote the prosperity and general welfare of the community; and

Whereas, in order to secure the necessary authority to the city to effectuate said public purpose, the General Assembly of North Carolina passed and there was ratified on 23 August, 1920, "An act authorizing the city of Greensboro to issue bonds for the purpose of building a passenger station," said act being chapter 105 of the Private Laws of the General Assembly of North Carolina, Extra Session 1920, copy of which act is hereto attached, marked Exhibit "A," now referred to and made a part hereof; and

Whereas the right of the city to issue bonds as provided in said act has been secured by the approval of a majority of the qualified voters of said city determined at an election duly and legally called and held in the city on 11 April, 1922, the result of which election is shown by the certificate of the judges of said election hereto attached, marked Exhibit "B"; and

Whereas the railway company owns, controls, leases, and operates lines of railroad entering the city of Greensboro, N. C., and is engaged in the operation of passenger trains and the transportation of passengers thereon to and from the said city of Greensboro; and

Whereas, the railway company is willing to convey or have conveyed to said trustee upon the trusts hereinafter recited, title to the land upon which the said passenger station and its appurtenances is to be erected, and to enter into a rental contract for the use and occupancy of said station building and accessories in accordance with the terms hereof: Now, therefore, this agreement witnesseth:

CITY'S COVENANTS.

That the city, for and in consideration of the covenants of the railway company and the trustee hereinafter expressed, hereby covenants and agrees:

1. That upon conveyance to Greensboro Bank and Trust Company, trustee, by Southern Railway Company, or at its direction, of the land hereinafter specifically described upon which the station is to be erected, with good title, free and clear from all encumbrances, satisfactory to the city, as shown by certificate of the mayor of the city to be attached to said trust deed, the city, through its duly authorized governing board, and by regular ordinance, will issue and deliver to the trustee, its "City of Greensboro—North Carolina Passenger Terminal Thirty Year Gold Bonds," authorized by the act of the General Assembly of North Carolina ratified on 23 August, 1920, hereinbefore referred to, in an aggregate amount of not exceeding one million, three hundred thousand dollars ($1,300,000) par value. Said bonds shall mature thirty years from the date thereof and shall bear interest at not exceeding six (6) per cent per annum, payable semiannually.

2. The city hereby agrees and binds itself at the meeting of its governing board, to be held at the time now fixed by law in each year, or which may hereafter be fixed as the time for levying the taxes of the city, or as soon thereafter as may be, during each year of the thirty-year term of said bonds, to levy a tax sufficient to pay the interest that may be then due and to provide that year's proportionate part of the sinking fund for the payment of the principal of said bonds at maturity, the amount of interest, and the amount to be paid into the sinking fund to be annually certified by the trustee to the governing body of the city: *Provided*, the tax shall be collected only when the trustee has not in hand from the rent agreed to be paid by the railway company funds with which to pay the interest and the yearly proportion of the sinking fund to retire the principal at maturity.

3. Such amount of said bonds, bearing interest at the rate fixed by the city, which shall not be in excess of six (6) per cent per annum, payable semiannually, so issued and delivered to the trustee, as it may be found necessary to sell to pay for the construction of said station and all of its appurtenances, together with the underpass, will be authenticated by the trustee and be by the city sold and disposed of to the best advantage at not less than par and the proceeds thereof, less the necessary costs of preparing, issuing, and selling the bonds, paid into the hands of the trustee, and shall be used by the trustee in payment for the construction of the passenger station and all appurtenances, including the underpass. The trustee shall pay out the money only on proper joint certificate of the chief engineer of the railway company and an

authorized representative of the city, as will be more particularly provided for in the contract and specifications to be entered into for the construction of said passenger station and facilities. If the sale of said bonds in amount sufficient to cover the estimated cost of the construction of said station and all of its appurtenances, together with the underpass, shall not be sufficient to fully pay for same at the end of the said construction, the trustee shall authenticate and the city shall sell and dispose of an additional amount of said bonds sufficient to complete the payment of all of said construction work, and should there be any balance left in the hands of the trustee on final completion of the station and its appurtenances, together with the underpass, said balance shall be by the trustee covered into the sinking fund for the retirement of the principal of the bonds at maturity and a certificate thereof furnished the city and the railway company by the trustee.

4. That upon the payment of the interest on said bonds and the payment of the principal at maturity and compliance by the railway company with its covenants herein contained, the city will release and discharge any lien or claim whatsoever it may have to said station property and its appurtenances, other than the underpass, which is to forever remain a street of the city open to the use of the public and subject to the city's control, and to that end will join the trustee in such conveyances as may be necessary to accomplish the conveyance of full and complete title to the railway company, its successors or assigns, when all obligations of the city in connection therewith are paid off.

RAILWAY'S COVENANTS.

The railway company, in consideration of the covenants of the city and trustee, hereby covenants and agrees:

5. That it will, upon notice from the governing board of the city that the city has executed this contract and is authorized to issue the bonds as herein provided, execute and deliver, or cause to be executed and delivered, to Greensboro Bank and Trust Company, trustee, in trust for the security of said bonds and the payment of the interest thereon, a deed or deeds conveying good and sufficient title, free and clear from all encumbrances, to the property in the city of Greensboro, county of Guilford, State of North Carolina, particularly described as follows:

Beginning at the corner formed by the intersection of the south boundary line of Depot Street with the east boundary line of South Elm Street, and running thence

(1) Eastwardly along said south boundary line of Depot Street, a distance of 290.1 feet, more or less, to the southwest corner of Depot and South Davie streets; thence

(2) Southwardly along the west boundary line of South Davie Street, a distance of 88.5 feet to a rail; thence

(3) Southwestwardly a distance of 312 feet, more or less, to a rail in the east boundary line of said South Elm Street; thence

(4) Northwardly along the said easterly boundary line South Elm Street, a distance of 190 feet, more or less, to the point or place of beginning, containing .93 acres, more or less.

And beginning at a point on the easterly boundary line of South Davie Street, 141.8 feet northwardly from the original center line of the North Carolina Railroad, measured along the said east boundary line of South Davie Street, and running thence

(1) Eastwardly along a line parallel with and at all points 12 feet south of the present northerly limit of the property of the railway company, a distance of 116.8 feet, more or less, to the westerly boundary line of Eckles Street produced; thence

(2) Southwardly along the said westerly boundary line of Eckles Street produced a distance of 63.5 feet; thence

(3) Southwestwardly a distance of 124 feet, more or less, to a point in the easterly boundary line of said South Davie Street, 45.3 feet northwardly from the said original center line of said North Carolina Railroad, measured along said street line; thence

(4) Northwardly along said east boundary line of South Davie Street a distance of 106.5 feet, more or less, to the point or place of beginning, containing .23 of an acre, more or less.

6. That upon notice to the railway company from the trustee that the bonds in an amount necessary and required for the construction of the said passenger station and appurtenances, underpass, etc., have been legally authorized and duly issued by the city and are in the hands of the trustee for certification and delivery to a purchaser or purchasers named by the city at a price satisfactory to the parties hereto, which price will net to the city the estimated cost of all of said construction, the railway company shall prepare and have presented to the trustee for execution a contract or contracts with a reliable contractor or contractors satisfactory to the city and the railway company for the construction of the station building, its approaches, plazas, entrances, ways, streets, necessary tracks, and the underpass under Davie Street, in accordance with plans, copy of which are hereto attached, marked Exhibit "C," which plans have been agreed upon between the city and the railway company, which agreement is evidenced by the approval of said plans by the city manager for the city and by an executive officer of the railway company for the railway company, and in accordance with specifications hereafter to be agreed upon between the city and the railway company. The work of construction shall be done under the direction and control of the railway company, but in accordance with the plans and specifications agreed on, as above set forth. The construction work shall begin

within ninety days from the sale of the first installment of bonds. The entire construction work herein provided for shall be completed at a cost to the city not in excess of its authorized bond issue for this purpose. The contract for the work and construction so undertaken shall provide for its completion for occupancy within not less than twenty-four months from the signing of the contract, with the usual penalties incorporated in the contract for failure to comply.

7. The railway company agrees that it will use the said passenger station building, tracks, and appurtenances constructed hereunder for the handling of all its passenger train business (including trains containing mail, baggage or express, as well as passenger cars) in and through the city of Greensboro, N. C., for and during the full term hereby created; that is to say, for thirty years, beginning on the date of the execution and certification of the bonds and thence next ensuing; and this undertaking shall be binding upon the parties hereto and their respective successors and assigns.

8. That for the use of the said passenger station and terminal, with all appurtenances thereto, for the transaction of its passenger terminal business in the said city of Greensboro, for and during the life of the said bonds of the city of Greensboro, it will pay as rent therefor the following sums of money and comply with the following covenants, namely:

(1) Pay to the trustee, in lawful money of the United States of America, in monthly installments (the first monthly installment being due the last day of the month the bonds are dated and certified, in order to take care of interest during construction) an annual sum which will be equivalent to the interest on the amount of said bonds outstanding, and will pay to the said trustee monthly of such further sum as will provide a sinking fund which when invested by the trustee in the manner herein provided shall be sufficient to pay off and discharge at maturity said bonds issued and sold, but not exceeding a total sum of one million three hundred thousand dollars ($1,300,000).

(2) The railway company will, at its own expense, properly furnish and equip said station after it is constructed, and will pay for all necessary repairs, replacements, renewals, and upkeep on said passenger station and its appurtenances, excluding the underpass, and will maintain, preserve and keep the same in proper repair, and will pay and discharge any and all taxes, assessments, or other charges whatsoever which may be lawfully levied, assessed, or imposed during the term hereby granted by any government or lawful authority whatsoever upon the premises hereby leased, or any part thereof, or upon the income of the same, it being the intent and meaning hereof that all governmental charges upon the aforesaid property, or the income therefrom, shall be

assumed and satisfied by the railway company. Nothing herein contained shall be construed to exempt the aforesaid property from taxation.

(3) Will pay the necessary expenses devolving on the said trustee in the execution and conducting of its trust.

(4) The railway company shall and will during the life of this agreement keep the said passenger station building insured against any loss or damage by fire, to an amount equal to the value of the fire destructible part of said building, or such an amount, if less, as said building will bear. The insurance shall be in company or companies to be approved by the trustee, its successors or assigns, the loss, if any, to be payable to the trustee, its successors or assigns, in trust for the holders of the bonds above mentioned, and the policy or policies covering such insurance shall be delivered to such trustee; all insurance premiums shall and will be paid by the railway company and in default of the railway company keeping the building so insured, the trustee, its successors or assigns, may take out such insurance from time to time in amount as above provided, not exceeding the unpaid portion of said bonds, less any sum in the sinking fund in the hands of the trustee applicable to the retirement of said bonds at maturity, and the railway company shall and will pay to the trustee the amount of such premium or premiums so paid, with interest at 6 per cent per annum from time of payment. Upon the payment of any insurance money on account of losses covered by such insurance, it shall be held and retained by the trustee, its successors or assigns, until the replacement or repair of said passenger station building covered by said insurance, and upon proof satisfactory to the trustee, its successors or assigns, of the proper replacement or repair of said building, the duty to replace or repair which is upon the railway company, said insurance money so collected shall be paid to the railway company.

TRUSTEE'S COVENANTS.

The trustee, in consideration of the covenants of the city and of the railway company, hereby covenants and agrees:

9. That it will, as trustee, accept conveyance of the said property referred to in paragraph four above and hold the same upon the conditions and terms in said conveyance set forth.

10. That it will, as trustee, accept delivery of the said bonds referred to in paragraph one hereof. That it will certify and authenticate only such an amount of said bonds as may be necessary to pay for the cost of the said stations, facilities, underpass, etc.

11. That it will execute a contract for the construction of said station facilities, appurtenances, underpass, etc., as herein provided for, the same to be constructed in accordance with the plans and specifications to be approved by the city and the railway company, as above set forth.

That it will pay to the contractor, on certificate calling for said payment, duly approved by the city and the chief engineer of the railway company, such sum or sums of money as may come due when the same come due under the contract hereinabove provided for.

12. That it will execute an agreement and lease of said station building and its appurtenances to the railway company in accordance with the provisions of the act of the General Assembly of North Carolina ratified on 23 August, 1920, hereinbefore referred to, and upon terms consistent therewith to be agreed upon between the parties hereto, leasing unto the railway company, and its successors and assigns, the right to use for a term of thirty (30) years, beginning the date said bonds bear date, for the accommodation of its passenger traffic in the city of Greensboro, the following:

All and singular the passenger station building situate in and upon parcels of land hereinbefore described, and to be conveyed to the trustee by the railway company, or at its direction, together with the tracks constructed or to be constructed leading into and used in connection with said station building, and together with all of the houses, offices, baggage, and waiting rooms, platforms, and appurtenances of whatsoever nature to the said station building, and tracks appertaining thereto which may be necessary for the movement of passenger trains, and the use and convenience of passengers, and the handling of baggage, mail, and express, and the transaction of passenger business at the said city of Greensboro.

The city will join in the said lease if that be desired.

13. That it will invest at stated periods, not in excess of three months apart, unless a longer period is agreed to in writing by the parties hereto, all moneys coming into its hands under this agreement for the purposes of the sinking fund. The said investment shall be in the bonds issued by the city of Greensboro under its agreement and said act of 23 August, 1920, in so far as they may be purchasable at and for a price not in excess of 105. If such bonds cannot be acquired, then the trustee shall invest such funds, at periods not greater than three months, in securities of the Government of the United States of America or of the State of North Carolina or of the city of Greensboro, N. C., or of the county of Guilford, N. C., except that upon recommendation by the trustee in writing, and consent thereto by the city and the railway company, the trustee may invest in other approved securities. The agreement to so invest shall specifically name the security or securities. The bonds as paid shall be canceled by the trustee and surrendered to the city and a certificate showing cancellation and surrender furnished by the trustee to the railway company.

14. Until payment by the railway company, its successors or assigns, to the trustee, its successors or assigns, and to the holders of the bonds

above provided for, of the entire cost of the said station building, facilities, underpass, etc., and until all the obligations of the railway company hereunder shall have been fully complied with and performed, title to the ground and the station and said facilities shall not pass to or vest in the Railway Company, but shall remain in the trustee, its successors or assigns in the trust, to perform and enforce this agreement for the benefit of the bonds above referred to.

15. That it will, upon the payment by the railway company of all the aforesaid bonds in full, together with the interest thereon, in the manner and form herein provided, and upon the performance by the railway company of all the obligations and agreements herein contained, execute and deliver to the railway company, or as it may direct, at the expense of the railway company, all necessary deeds of conveyance which may be reasonably required by the railway company as evidence of its title to said land, the station building, and all appurtenances thereon.

In witness whereof the parties hereto have caused their respective corporate names to be hereunto signed in triplicate by their respective officers duly authorized and their respective seals to be hereunto affixed, duly attested by their respective officers duly authorized, all on the day and year first above written.

CITY OF GREENSBORO, NORTH CAROLINA,

[SEAL] By CLAUDE KISER,
Mayor.

Attest: B. T. WARD, *City Clerk.*

SOUTHERN RAILWAY COMPANY,

[SEAL] By L. E. JEFFRIES,
Vice-President.

Attest: W. S. CAMP, *Assistant Secretary.*

GREENSBORO BANK AND TRUST COMPANY,

[SEAL] By J. W. FRY,
President.

Attest: W. M. RIDENHOUR.

EXHIBIT "A."

AN ACT AUTHORIZING THE CITY OF GREENSBORO TO ISSUE BONDS FOR THE PURPOSE OF BUILDING A PASSENGER STATION.

The General Assembly of North Carolina do enact:

SECTION 1. That for the purpose of constructing in the city of Greensboro, North Carolina, a suitable passenger station to be used and operated by the Southern Railway Company on terms hereinafter pro-

vided, the city of Greensboro is authorized to issue, sell, or otherwise dispose of its bonds not to exceed one million three hundred thousand dollars ($1,300,000), par value, and use the proceeds therefrom in the construction of said station building, its approaches, plazas, entrances, ways, streets, necessary tracks, in accordance with plans to be agreed on between said city and said railway company; said bonds maturing thirty (30) years from date, bearing interest at a rate not to exceed six per cent per annum, evidenced by coupons due semiannually, principal and interest payable at such place and of such denomination and form as may be determined by ordinance of said city.

SEC. 2. Said bonds, or any part thereof, shall be issued and constitute a valid obligation of said city only on approval of a majority of the qualified voters of said city, to be determined at an election to be called as herein directed.

SEC. 3. The governing board of the city shall call said election by ordinance, which ordinance shall be introduced at least one week before its final passage, and if amended at any meeting it stands for passage, can be with said amendment adopted at said meeting. Such ordinance shall provide a new or special registration of voters for said election, shall designate the precincts and voting places and name the registrars and judges of said election, provide the form and wording of the ballot to be used, and the ordinance published as said board may order. That the qualification of voters, the holding and conduct of said election, canvass of returns, and declaration of result and all other matters pertaining to said election shall be under rules and regulations provided for elections of members of the board of commissioners of the city of Greensboro. If at said election a majority of the qualified voters shall vote for bonds, then the governing board of said city shall issue, sell, or otherwise dispose of said bonds, or so much thereof as may be necessary, and use the proceeds for the construction of the passenger station and accessories as aforesaid. That the work shall be done under the direction and control of the Southern Railway Company, who shall execute same in accordance with plans and specifications agreed on between the parties, as aforesaid.

SEC. 4. That before any of said bonds shall be sold, or offered for sale, the Southern Railway shall cause to be conveyed to a trustee selected by the governing board of the said city and the Southern Railway Company the land on which said station is to be erected, with good title, free and clear from all encumbrances, and said Southern Railway Company shall make and execute a contract with said city and said trustee providing in substance as follows: That the lands conveyed to the trustee, the station building, and all other improvements thereon shall be held by the trustee to secure the payment of said bonds, principal and interest as aforesaid; that the Southern Railway Company shall

properly furnish and equip said station after its construction, pay for all necessary repairs and upkeep, and pay to said trustee for the benefits of said city, for the use and occupation of said station building and accessories, by a monthly rental, a sum of money sufficient to pay the interest on said bonds, and provide a sinking fund, which, when invested by the trustee, shall be sufficient to pay off and discharge said one million three hundred thousand dollars ($1,300,000) of bonds at maturity; that on payment of the principal and interest of said bonds in full, said trustee shall convey title to said land and passenger station to the Southern Railway Company, its successors or assigns, and said city of Greensboro shall release and discharge any lien or claim it may have on said property; and said contract may contain such other provisions for the furtherance and protection of the agreement between the parties thereto as they may determine.

SEC. 5. That said board of commissioners shall annually levy a tax sufficient to pay the interest on said bonds and to provide a sinking fund for the payment of the principal thereof at maturity: *Provided*, that said levy shall not be made if said Southern Railway Company shall monthly pay to said trustee an amount sufficient to pay said interest and to provide for said sinking fund with which to pay said bonds at maturity.

SEC. 6. That the provisions of chapter one hundred and thirty-eight of the Laws of one thousand nine hundred and seventeen, or any amendment thereof, or the provisions of section two thousand nine hundred and seventy-seven of the Revisal of nineteen hundred and five limiting the right of cities to 10 per cent of the assessed valuation of real and personal property shall not apply to or in any way affect the validity of the bonds authorized by this act, or the payment thereof, nor shall the amount of said bonds outstanding be computed by said city in making any estimate of its liability under said section two thousand nine hundred and seventy-seven of said Revisal.

SEC. 7. That all laws and clauses of laws in conflict with this act are hereby repealed.

SEC. 8. That this act shall be in force from and after its ratification.

EXHIBIT "B."

EXTRACTS FROM MINUTES OF THE CITY COUNCIL OF GREENSBORO, N. C.

GREENSBORO, N. C., Monday, 24 April, 1922.

Regular Meeting.

Council met with all members present, to wit: Brooks, Grimsley, Hiatt, Kiser, Mendenhall, Price, and White.

. . . . . .

Councilman Brooks moved that the report of the judges of election for the election held on 11 April to submit to the voters of the city

question of issuing $1,300,000 passenger station bonds be received and ordered spread upon the minutes. Upon this motion the roll was called as follows: Ayes—Brooks, Grimsley, Hiatt, Kiser, Mendenhall, Price and White. Nays—None.

REPORT.

STATE OF NORTH CAROLINA—CITY OF GREENSBORO.

The undersigned, being the registrars and poll holders for Gilmer and Morehead precincts in the city above named, for the special election held on 11 April, 1922, at which was submitted to voters of the city "An ordinance to authorize the issuance of $1,300,000 passenger station bonds, and to submit the same to the vote of the people," do hereby certify that we met at the City Hall in Greensboro, at 10 o'clock a. m., on this 12 April, 1922, and formed the canvassing board for said election, as provided by section 41 of the charter of said city.

T. G. McLean was elected chairman and J. R. Cutchin was elected secretary.

We then proceeded to receive and tabulate the number of qualified voters for said election and the votes cast in said election, which we find and declare to have been as follows, to wit:

	Number of Qualified Voters	Votes for Said Ordinance	Votes Against Ordinance
Gilmer Precinct	1585	995	122
Morehead Precinct	1843	1150	149
Totals	3428	2145	271

We therefore declare the result of said election to be that said ordinance has been approved by a majority of the qualified voters of said city for said election; and that the bonds described in said ordinance have been authorized and approved in said election by a majority of the qualified voters of said city.

Witness our hands and seals, this 12 April, 1922.

Gilmer Precinct:

T. G. MCLEAN, *Registrar.* [SEAL]
RICHARD WINSTEAD, JR. [SEAL]
R. A. GILMER, *Poll Holder.* [SEAL]

Morehead Precinct:

J. L. TYSOR, *Registrar.* [SEAL]
J. R. CUTCHIN. [SEAL]
H. T. MARTIN, *Poll Holder.* [SEAL]

I, B. T. Ward, city clerk of the city of Greensboro, hereby certify that the foregoing is a true copy of so much of the proceedings of the city council of the city of Greensboro at a regular meeting held on

Monday, 24 April, 1922, as relate to the report of the judges of election for the election held on 11 April, 1922, to submit to the voters of the city of Greensboro the question of issuing $1,300,000 passenger station bonds, this transcript having been copied by me from the official minutes of said meeting as recorded in volume 9, page 613, of the records.

Witness my hand and the seal of said city, this 12 February, 1923.

B. T. WARD, *City Clerk.* [SEAL]

Upon the hearing the court adjudged that the act of the Legislature was constitutional, that the contract and the issue of bonds had been duly approved by the popular vote, and were valid, and denied the application for an injunction. Appeal by plaintiff.

A. Wayland Cooke for plaintiff.

E. L. Brooks and B. L. Fentress for the city of Greensboro.

Wilson & Frazier and Manly, Hendren & Womble for Southern Railway Company and North Carolina Railroad Company.

R. D. Douglas for Greensboro Bank and Trust Company.

CLARK, C. J. The court properly held that there was no constitutional inhibition against the act of the General Assembly of North Carolina authorizing the city of Greensboro to issue bonds for the purpose of building a passenger station and underpass, etc., as specifically set forth and provided by Private Laws, Extra Session 1920, ch. 105, and that the contract between the city of Greensboro and other defendant was in accordance with the terms of said act.

The qualified voters of the city of Greensboro, to whom under the act the proposition was submitted, had the right to determine, as they have done by a large majority of the registered voters, that the contract between the city and the railroad company should be made and the bonded indebtedness therein contemplated created, and having so elected, their action is not subject to judicial review.

It was within the scope of the powers of the Legislature to enact the statute in question. The contract was made strictly in accordance with the terms of the statute, and it and the issue of bonds authorized thereby have been ratified at the ballot box as provided by the statute. There being no constitutional prohibition the matter is purely one of public policy.

On full and careful examination of the terms of the contract (set out in the record as "Exhibit B") between the city of Greensboro and the Southern Railway Company upon mutual considerations from each to the other, and the benefits that are expected to accrue to the city which are within the scope of the public interests, we find that the undertaking is for a public purpose. The parties were duly authorized by legislative

enactment to make and enter into the contract presented for our consideration and to perform the obligations therein assumed.

When the trustees, under the various deeds of trust, have executed and delivered to the Southern Railway Company the releases proposed and the North Carolina Railroad Company has executed its proposed conveyance to the Southern Railway Company and all have been duly recorded, then, in that event, the Southern Railroad Company will be authorized to convey to the trust company a good title in fee simple to the two lots of land in question, clear and free of all encumbrances. When the Southern Railway Company has executed the proposed deed of trust upon the two lots of land in question, as provided in the contract, the city of Greensboro can issue its bonds as provided by the several acts of the General Assembly and the terms of contract. Said bonds, when so issued, will be a valid and outstanding obligation of the city and the parties to the contract.

The case was very fully and ably argued before us by counsel representing all the parties at interest, both by the parties to the contract and by the plaintiff opposing the constitutionality of the act and the validity of the contract. After full consideration, we have reached the same conclusion as his Honor.

It was earnestly argued before us that the proposition that the city of Greensboro should loan this fund would impair its credit, that the issue of over a million dollars in bonds by a city for the purposes recited was not only novel, and, indeed, unprecedented, but might prove disastrous in certain contingencies in the uncertain future, and that the precedent thus set, if followed to any extent, would not serve the public interest. But these are not matters which are confided to this branch of the government.

The legislative authority of the State, acting within its authority and violating no prohibition in the Constitution, in its wisdom saw fit to enact this statute, which authorized the contract that is presented in this record, and the parties thereto, the city of Greensboro and the Southern Railway Company, with the assent of the North Carolina Railroad Company, have drawn up a contract within the terms authorized by this statute and the qualified voters of the city of Greensboro have endorsed the action of their representative body, and at the ballot box, the vote being regularly and properly taken in the manner provided by the statute, have ratified and confirmed the contract and have directed the issue of the bonds. They have assumed the responsibility, and whether the proposition shall prove to be a wise and a safe one was a matter which the Legislature and the city of Greensboro had a right to determine, and they have done so.

The judgment of his Honor is

Affirmed.

THE FARMERS TOBACCO WAREHOUSE COMPANY v. EASTERN CAROLINA WAREHOUSE CORPORATION AND TOBACCO GROWERS' CO-OPERATIVE ASSOCIATION.

(Filed 26 May, 1923.)

1. Fires—Vendor and Purchaser—Contracts to Convey—Owner.

Where valuable buildings on real estate for which a bargain of sale is pending are a principal and substantial inducement to the contract of purchase, and are destroyed by fire without the fault of either of the parties, the loss will fall upon the one who is the owner of the property at the time of the fire; and if the negotiations at or before that time have resulted in an enforceable and binding agreement to convey, and there is no express stipulation to the contrary, the proposed vendee or holder of such agreement will be regarded as the owner of the property.

2. Same—Vendor's Title.

Where the vendor, in a contract to convey lands, the buildings on which are a material and substantial inducement for the transaction, are destroyed by fire, is not at the time of the fire in a position to convey the property for the lack of title or legal right thereto, or if the contract is incomplete and unenforceable for any reason, the loss will fall on the vendor, and the vendee may elect to proceed no further in the matter.

3. Deeds and Conveyances—Contracts to Convey—Description of Land—Sufficiency.

A contract to convey an established and known tobacco warehouse, by name, it "being the vendor's warehouse and plant, meaning thereby the actual warehouse and storehouse, necessary equipment, furniture, fixtures, platform, sidings, tracks," known as the Farmers Warehouse, New Bern, N. C., etc., etc., is sufficiently described and identified to constitute a binding agreement to sell and convey, and is not unenforceable by reason of indefiniteness of identification, and when necessary and proper and otherwise enforceable, the courts will order a survey to be made in the enforcement of the contract in the vendee's favor.

4. Same—Statute of Frauds—"Signed"—Subscribed.

The statute of frauds requiring that contracts for the sale of lands, etc., to be enforceable must be in writing, does not require that the writing must be subscribed by the parties, but only that it be signed, and where the description of the lands appears below their signatures, and it clearly appears that this was intended by the parties as a part of the contract, it comes within the intent and meaning of the statute.

5. Deeds and Conveyances—Contracts to Convey—Title—Encumbrances—"Owner"—Specific Performance.

Where the parties to a contract to convey lands recognize the existence of certain mortgage liens thereon, and with the vendor's knowledge of the amounts and provision made therefor, agree to the conveyance of the equity of redemption, these encumbrances do not fall within the principle that encumbrances in a substantial sum, unknown to the vendee and indeterminate as to amount, will avoid the contract as to his rights; and where it is made to appear before a court of competent jurisdiction that the encumbrance immaterially exceeds the purchase price, or that full

and adequate protection can be afforded, or that the vendee will get the title he has contracted to receive, specific performance will be decreed by the Court, with proper provision made for clearing the vendee's title; this being especially insistent where the vendee has gone into possession fully aware of the encumbrances and has been exercising over the property full control as owner.

6. Same—Fires.

The owners of a warehouse for the sale of leaf tobacco contracted to convey the same subject to enumerated liens thereon, with provision that they should not exceed one-half of the value of the property to be afterwards ascertained by a designated method, and the purchase price finally established was within an inappreciable amount of the encumbrances thereon. The lienors gave assurance that they were at all times ready, willing, and able to modify the amounts of their liens, so as to enable the vendor to comply with his contract, with other evidence that the vendee would get an unencumbered fee-simple title, which it would have taken except for a delay caused by the vendor, and pending these conditions the warehouse, etc., was destroyed by fire, without fault on the part of the parties to the contract, while the vendee was in possession, exercising full rights of ownership: *Held*, the contract was enforceable against the vendor, and the vendee is regarded as the owner upon whom the fire loss must fall.

APPEAL by defendants from *Grady, J.*, at January Term, 1923, of CRAVEN.

Controversy without action, submitted on case agreed. The facts submitted by the parties, omitting for the present certain exhibits annexed thereto and made a part of the same, are as follows:

"It is agreed by the parties hereto that the facts hereinafter set forth constitute the basis of a real controversy between the parties hereto, and the said facts are hereby submitted to the court for its determination, as provided by statute, in a controversy without action.

"1. That under date of 7 April, 1922, the plaintiff and Tobacco Growers' Coöperative Association, acting on behalf of itself and Eastern Carolina Warehousing Corporation, entered into an agreement for the purchase and sale of real estate, a copy of which agreement is hereto attached, marked Exhibit 'A,' made a part of this statement of facts, and asked to be here read as though here set forth in full.

"2. That subsequently the parties aforesaid agreed that the transfer and settlement should be made in accordance with the terms of method 1 of said contract, as contained in Exhibit 'A.'

"3. That it was at all times the understanding and agreement of the parties that under method 1 a mortgage or deed of trust 'for a reasonable amount' fairly and properly means a mortgage or deed of trust not in excess of 50 per cent of the determined value of the property. The parties now so agree that the term 'for a reasonable amount' properly and clearly means for an amount not in excess of 50 per cent of the agreed value of the property.

"4. That the plaintiff had caused an abstract of title to be furnished to defendants prior to 1 August, 1922; that the property to be conveyed by plaintiff was described in said abstract in accordance with diagram and description appearing on page attached to this statement, marked Exhibit 'B,' and asked to be here read as though here copied in full; that the said abstract was approved by counsel for defendants as to title, conditioned on the compliance with the terms of the contract hereinbefore set forth as Exhibit 'A' as to encumbrances.

"5. That under date of 13 November a supplemental agreement was made between the parties, said supplemental agreement being thereto attached, marked Exhibit 'C,' made a part of this statement of facts, and asked to be here read as though here copied in full. No plat was attached to this agreement as therein set forth, but survey of property of plaintiff had been made and plat furnished to defendants, substantially identical with plat appearing on Exhibit 'B.'

"6. That under date of 22 November attorneys for defendants addressed and forwarded to attorneys for plaintiff a letter, copy of which is hereto attached, marked Exhibit 'D,' made a part of this statement of facts, and asked to be here read as though here copied in full.

"7. That on 1 August, or thereabouts, the defendants went into actual physical possession of the tobacco warehouse located on the property described in Exhibit 'B,' and have had possession of said warehouse since 1 August until the said warehouse was destroyed by fire on 1 December, 1922, hereinafter set forth.

"8. That defendants, or either of them, without other expressed permission or consent than that contained in the agreements hereinbefore set forth, removed certain personal property used in connection with the operation of the said warehouse, to wit: fourteen tobacco trucks, and shipped same away from New Bern to another point where defendants were operating.

"9. That defendants have, without expressed consent or permission other than that contained in the agreements herein set forth, removed two large sets of tobacco scales from said warehouse, which said scales were built in said warehouse upon a cement foundation, and defendants have shipped said scales away from New Bern to another point where defendants are operating.

"10. That on or about 9 August, at the request and requirement of defendants, plaintiff agreed to the attachment of clause to all policies of fire insurance on property described in Exhibit 'B,' which said clause as attached to said fire insurance policies bore the following words: 'It is understood and agreed that contract has been made for sale of this property, and loss, if any, shall be payable to owners as their interest may appear,' or words substantially similar thereto.

"11. That on 1 December, 1922, representatives of plaintiff called at the office of counsel for defendants in Raleigh, N. C., and discussed with said counsel the question of completing transfer contemplated by the parties, and requested and received from said counsel information concerning the various methods of settlement outlined in Exhibit 'A' attached hereto; method 1 having been theretofore selected; that the said representatives of plaintiff did not at that time definitely describe the property to be conveyed for the reason that the map of said property had been forwarded to the Richmond office of defendant association, and that said representatives of plaintiff departed stating to said counsel for defendants that they would advise definitely at a later date regarding the method of transfer to be followed, if they desired to change the same.

"12. That on 1 December, 1922, a general conflagration occurred in New Bern, N. C., and, without fault on the part of plaintiff or defendants, all of the buildings located upon all the property described in Exhibit 'B,' among which was the tobacco warehouse occupied by defendants as aforesaid, were completely destroyed by fire. The warehouse building so destroyed constituted a material part of the value of the real estate to be conveyed.

"13. That the abstract of title as submitted by plaintiff to defendants, as hereinabove stated, set forth and showed the following encumbrances against the property described in Exhibit 'B': Deed of trust to W. B. R. Guion and H. P. Whitehurst, acknowledged 31 January, 1919, for $18,000, and recorded in Book 227, page 265; deed of trust from Farmers Tobacco Warehouse Company to T. A. Uzzell, trustee, for $5,000; judgment in favor of Planters Warehouse Company for $500, with interest from 6 February, 1922, recorded in Judgment Docket 'Q,' page 298; deed of trust from Farmers Tobacco Warehouse Company to R. E. Whitehurst, trustee, dated 14 March, 1922, and recorded in Book 249, page 105, securing $23,000; county taxes for the year 1921, $243.36; city taxes for the year 1921, $221. Total, $46,964.36.

"The foregoing encumbrances appear on the records of Craven County and the city of New Bern, and are liens on all the property described in Exhibit 'B,' and on each separate part thereof.

"14. Each of the fire insurance policies on the property located within the boundaries set forth in Exhibit 'B,' among which were the policies amended as heretofore set forth, had been assigned for the benefit of the holders of the aforesaid encumbrances, and each of the said policies had affixed to it a clause directing that loss should be payable for the benefit of said creditors. On the said warehouse building there was fire insurance in the amount of $24,500.

"15. That on 13 November, 1922, and at all times thereafter up to and including 1 December, 1922, there was due and unpaid the following

amounts on the said encumbrances: Deed of trust to W. B. R. Guion and H. P. Whitehurst, acknowledged 31 January, 1919, for $13,000, and recorded in Book 227, page 265; deed of trust from Farmers Tobacco Warehouse Company to T. A. Uzzell, trustee, for $5,000; judgment in favor of Planters Warehouse Company for $..... (paid), with interest from 6 February, 1922, recorded in Judgment Docket 'Q,' page 298; deed of trust from Farmers Tobacco Warehouse Company to R. E. Whitehurst, trustee, dated 14 March, 1922, and recorded in Book 249, page 105, securing $23,000; county taxes for the years 1921 and 1922, $415; city taxes for the years 1921 and 1922, $378; interest due on encumbrances, $2,500. Total, $44,283.

"All the aforesaid sums were due and payable on 13 November, on 1 December, and all times between said dates; all were secured by liens or encumbrances upon all of the property described in Exhibit 'B,' and upon each part thereof. That of the aforesaid encumbrances, the Peoples Bank of New Bern was the holder as security of the deed of trust for $13,000, and interest thereon, and the Citizens Savings Bank and Trust Company was the holder of the deed of trust for $5,000 and deed of trust for $23,000, with interest thereon. That T. A. Uzzell is president of both the Peoples Bank and Citizens Savings Bank and Trust Company, and that W. H. Henderson is the cashier of the Citizens Savings Bank and Trust Company. That the two persons named as officers of the said bank had verbally assured the vendors that they would arrange the indebtedness to the respective banks in such a way as to enable the vendors to comply with the agreements set out in method 1 of Exhibit 'A.'

"16. That all of the aforesaid sums were secured by encumbrances or liens on the property proposed to be conveyed by plaintiff to defendants in accordance with the supplemental agreement of 13 November.

"17. On 20 December, defendants notified plaintiff that because of the destruction of the buildings on the real estate of plaintiff the defendants would not proceed with the contract of purchase, and offered to plaintiff reasonable compensation for the use of the property. The attorneys for defendants sent to attorney for plaintiff letter as is shown by copy attached hereto, marked Exhibit 'E,' made a part of this statement of facts and asked to be here read as though here copied in full.

"Upon the foregoing facts the court is asked to render judgment as follows: If the court is of the opinion that the contract as set forth in the supplemental agreement of 13 November should be specifically performed, that it render judgment requiring defendants to perform said contract in accordance with method 1 upon tender of proper deed and proper adjustment of the fire insurance collected, together with judgment for costs of this action.

"If the court is of the opinion that the said contract should not be specifically performed, then to render judgment accordingly, relieving defendants of all obligations except the payment of reasonable compensation for occupancy of the property and against plaintiff for costs of this action."

There was judgment for plaintiff, and defendants excepted and appealed.

Whitehurst & Barden for plaintiff.

Burgess & Joyner, Aaron Sapiro, and Lawrence L. Levy for defendants.

HOKE, J. It is ordinarily true that where, pending a bargain for the sale and purchase of real estate, valuable buildings thereon which are a principal or substantial inducement to the contract are destroyed by fire without the fault of either of the parties, the loss will fall on the one who is the owner of the property at the time of the fire, and in such case, if the negotiations have resulted in an enforceable and binding agreement to convey, the courts, by the weight of authority, and in the absence of an express stipulation to the contrary, will consider the proposed vendee or holder of such agreement as the owner of the property within the meaning of the principle. In further illustration, the cases on the subject hold that if the vendor is not at the time in a position to convey the property, not having acquired the title or legal right thereto, or if the contract is incomplete and unenforceable for any valid reason, the loss will fall on the vendor, and the vendee may elect not to proceed further in the matter. *In re Sermon's Land,* 182 N. C., 122-127; *Sutton v. Davis,* 143 N. C., 474; *Fonts v. Fondray,* 31 Ok., 22; *Foor et al. v. Mechanics Bank,* 144 Ky., 682; *Sewell v. Underhill,* 197 N. Y., 168; *Brewer v. Herbert,* 30 Md., 301; Pomeroy on Contracts, secs. 434-435; 25 R. C. L., pp. 555 and 556.

In the case cited of *In re Sermon's Land,* 182 N. C., at p. 127, the positions referred to are stated as follows: "It is very generally held that where pending a contract for sale of improved real estate, the buildings thereon are damaged by fire, the loss, as a rule, must fall upon the owner, and if the destruction wrought is such as make a material change in the property or substantially impair its value, specific performance will not be enforced at the instance of the vendor, and the bidder will be relieved of his obligation. By the weight of authority on the subject, when there exists a binding and enforceable contract to convey, the vendor being in the present position to make title, the purchaser is regarded as the owner and the loss must fall on him. But where the vendor has not yet obtained a title, or where the bargaining

between the parties has not been such as to give the proposed purchaser any interest in the property, or the contract is otherwise incomplete, the loss, as stated, falls on the vendor, and under the circumstances indicated he may not insist on performance."

It is objected for defendant that at the time of the destruction of the warehouse by fire there was no binding or enforceable agreement between the parties: First, because the same was not sufficiently definite as to the property to be conveyed; second, because at the time of the loss there were encumbrances on the property, secured by mortgages and deeds of trust, for debts past due and taxes accrued, contrary to the stipulations of the agreement, but in our opinion neither position should be sustained.

From a proper perusal of the facts, including the exhibits made a part of the case submitted, it appears that on 7 April, 1922, plaintiff, the owner, contracted to sell defendant a piece of property situated in New Bern, N. C., and generally known as the "Farmers Warehouse" (at a provisional price of $100,000, this to be finally fixed at a fair market value to be determined by a board or boards of arbitration selected by a designated method), and further described in the agreement as the plaintiff's "warehouse and plant, meaning thereby the actual warehouse and storehouse, necessary equipment, furniture, fixtures, utensils, platforms, siding, tracks, and lands on which they are situated, with all appurtenances thereof." That the agreement contained, among others, the stipulation "that if there was a mortgage or deed of trust on the property for a reasonable amount it may remain on the property provided no part thereof matures prior to 30 December, 1923," and in reference to this stipulation the parties in the case have agreed that the terms "for a reasonable amount" shall be construed to mean "an amount not in excess of fifty per cent of the agreed value of the property." That prior to 1 August, 1922, plaintiff caused an abstract of title to be furnished defendant which was approved by defendant's counsel as to title, which abstract contained also a diagram describing the property, the subject of the trade, and showing also the encumbrances then existent on the property of mortgages, and deeds of trust securing debts past due and accrued taxes to the amount of $44,283, and controlled principally by the Peoples Bank and Citizens Bank and Trust Company of New Bern, N. C., T. A. Uzzell being at the time president of both institutions and W. H. Henderson being cashier of the "Citizens Bank and Trust Company."

It further appears that on 22 November, 1922, the parties entered into a supplemental agreement, duly executed, reciting that whereas: "The owner and the association have executed a certain instrument known as the Standard Association, whereby the warehouse is to be sold

to the association at a fair market value to be fixed by arbitration, the parties hereby agree that the fair market value of the property embraced in the aforesaid agreement and completely and accurately described in a plat or drawing of such property attached hereto, together with all rights, privileges, and appurtenances to said property, is $43,500"; and in reference to this the case agreed states that "no such plat was ever attached to this agreement, but a survey had been made and a plat furnished to defendants." That under and by virtue of these contracts and agreements, the defendant, on 1 August, 1922, entered in possession and control of the property, using same as their own, and continued so to use and control it down to and at the time of its destruction, among other acts, shipping away fourteen tobacco trucks and removing two large sets of tobacco scales from their cement fastenings, and shipping them to other points for use in their business; and further, on 9 August, 1922, plaintiffs had agreed to attach to the fire insurance on the building a clause as follows:

"It is understood and agreed that contract has been made for the sale of this property, and loss, if any, shall be payable to owners as their interest may appear." . . . These policies in question being for $24,500, held at the time by the encumbrancers, and containing an express stipulation that "same was payable for the benefit of creditors."

From these the facts chiefly pertinent to appellant's first objection, we conclude that the contract is sufficiently definite, and that under the description "The Farmers Warehouse in New Bern, being the vendor's warehouse and plant, meaning thereby the actual warehouse and storehouse, necessary equipment, furniture, fixtures, platforms, sidings, tracks, etc., etc," the property is sufficiently described and identified to constitute a binding agreement to sell and convey. *Blanton v. Boney,* 175 N. C., 211; *Broadhurst v. Mewborn,* 171 N. C., 400; *Boddie v. Bond,* 158 N. C., 204.

As applicable to the question presented, in *Blanton's case, supra,* it was held: "A devise in this case of 'forty acres of land to include the dwelling and the old field' is held sufficient description to identify the lands, but if otherwise, the plaintiffs would take an undivided interest as heirs at law of the deceased, as in case of intestacy."

In *Boddie v. Bond, supra:* "A devise to the wife of 'the house where we now live, with all the outhouses, embracing the peach and apple orchard,' etc., is a sufficiently definite description to pass title to the property and permit the reception of parol evidence to fit the description to the land intended by the devise."

True, the part of the description, "The warehouse situate in New Bern and generally known as Farmers Warehouse," appearing in Exhibit "A," is just below the signature of the parties, but it is evidently

intended as a part of the agreement, and our statute of frauds using the word "signed" and not "subscribed," the description is just as binding as if written in the body of the paper. 2d Page on Contracts (2 ed.), sec. 1177. And while the parties evidently contemplated that there should be an actual survey and plat made and the same should be annexed to the supplemental agreement which was never done, the description as stated is sufficiently complete without it, and no court would hesitate to have a survey made or direct that the line be run so as to include the "actual warehouse, sidings, tracks, and appurtenances as agreed upon." Under these the recognized principles applicable this objection must be overruled.

And in reference to appellant's second position as to encumbrances, while the existence of an encumbrance inherent in the property as an easement, substantially impairing its value, or a moneyed lien for a substantial sum, unknown at the time of the contract or indeterminate in amount has been held to interfere with the conveyance of a marketable title (particularly where there is an express covenant against encumbrances), a mortgage or deed of trust to secure a definite sum of money, which is known to exist at the time of the contract, is not regarded as such an encumbrance in the strict sense of the term, nor will its existence always justify an avoidance of the agreement on the part of the vendee. Thus, where it is made to appear before a court having jurisdiction of the question that the encumbrance complained of is less than the purchase price, or where, being a docketed judgment, the amount has been amply secured on appeal in the case, or where, being of small, proportional amount, full and adequate protection can be afforded, it is held that specific performance will be enforced, the decree making proper provision for the relief of the property. A position especially insistent where the vendee has gone into possession fully aware of the alleged encumbrance and has been exercising over the property full control as owner. *Guild v. R. R.*, 57 Kansas, 70; *Thompson v. Carpenter et al.*, 4 Pa. St., p. 132; *Louis Blank v. Sadler*, 153 N. Y., 551; 1st Warville on Vendors, pp. 325-329-330; 25 R. C. L., p. 227, sec. 78; Bispham's Equity (9 ed.), sec. 389.

And the case of *Sutton v. Davis*, 143 N. C., *supra*, is in affirmance of the same general principle.

From the statement and exhibits it appears that these encumbrances were fully known, were definite in amount, and the parties in their contract had made express stipulation concerning them; that mortgages and deeds of trust might remain on the property to a reasonable amount (agreed by the parties to be as much as fifty per cent of the determined value), and the maturity of the same be postponed till 1 December, 1923. That the purchase price agreed upon was within $783 of the

alleged encumbrance, and so far as appears, plaintiffs are solvent and fully able to protect the vendees in the title offered. That the holders of these liens had given assurance, and were at all times ready, willing, and able to so modify them as to enable vendors to comply with the contract, and the plaintiff's representatives were here in Raleigh to carry out and complete the transfer on the day of the fire, and were prevented from doing so because defendants had sent the plat and survey to their Richmond office; and further, these lienors have since given their written obligation fully carrying out their assurances. And that defendant, as purchaser, had been in possession and control of the property since 1 August, exercising over it all the rights of owner.

On these the facts chiefly pertinent and under the authorities cited and the principles they approve, we are of opinion that at the time of the fire defendants were in possession of the property having an enforceable contract of purchase against the vendor; that the encumbrances themselves were the subject of such contract, and on the facts presented could readily have been dealt with by court decree so as to constitute no valid interference with a marketable title, and the vendee therefore being regarded as owner, must bear the loss occasioned by the destruction of the buildings. And the ruling of his Honor that defendants be held to comply with their contract of purchase must be

Affirmed.

R. H. LEONARD AND OTHER TAXPAYERS OF SURRY COUNTY v. THE BOARD OF COMMISSIONERS OF SURRY COUNTY.

(Filed 26 May, 1923.)

Constitutional Law—Faith and Credit—"Aye" and "No" Vote—Journals—Majority in Affirmative.

A bill to authorize a county to pledge its faith and credit by issuing bonds for road purposes, and duly ratified, is not invalid for the failure to meet the requirements of Article II, section 14, of the State Constitution, requiring that all bills of this character shall be read three several times in each house of the General Assembly, and pass three several readings on different days by each house respectively, with the "aye" and "no" vote entered on the journals of each house on the second and third readings, by reason of the failure to record on the journal on the second reading in one of the branches of legislation the "no" vote, when it is made to appear from the entries of the names of those voting in the affirmative that a majority of the voters had so voted, the absence of the entries of the names of those voting in the negative showing that there were none.

CIVIL ACTION, heard May, 1923, on application to restrain defendants from a proposed bond issue for road construction and improvement in

said county, before *Shaw, J.*, presiding in the courts of the Eleventh District. The pertinent facts and the disposition of the question presented appear in his Honor's judgment, as follows:

"This cause coming on to be heard upon the complaint and answer filed, the Court finds as a fact that the General Assembly of North Carolina, at its session 1923, passed an act entitled 'An act to authorize the county commissioners of Surry County to issue $150,000 of county bonds for the purpose of constructing and improving the public roads of Surry County,' said act being ratified on 9 February, 1923, same being House Bill No. 208 and Senate Bill No. 224.

"The court further finds as a fact, from the pleadings of this cause, that the said act was sent from the House of Representatives to the Senate and placed upon the calendar, and on 5 February, 1923, it was called in the Senate for its passage upon the second reading, when the following entries were made, to wit:

" 'Senate Bill 224, House Bill 208, a bill to authorize the county commissioners of Surry County to issue $150,000 of county bonds for the purpose of construction and improving the public roads of Surry County upon the second reading.

" 'Those voting in the affirmative are Senators Armfield, Baggett, Boyette, Brown of Columbus, Brown of Rockingham, Castelloe, Delaney, Ebbs, Grady, Graham, Griffin, Hargett, Harris of Franklin, Harris of Wake, Harrison, Heath, Hodges, Johnson of Beaufort, Jones of Alleghany, Jurney, Lattimore, McDonald, Mendenhall, Moss, Parker, Ray, Sams, Squires, Tapp, Varser, Walker, Williams, Woltz, Woodson—35.'

"The court further finds that the said act was called in the Senate on .... February on its third reading, and the entries made on the journal show that the requirements of Article II, section 14, of the Constitution were complied with, and that the said act was declared by the Senate as duly passed, and ordered to be enrolled, and was duly ratified on 9 February, 1923.

"The court further finds that at the regular meeting of the board of commissioners of Surry County, held at Dobson, the county-seat, on the first Monday in March, 1923, all members of the said board present, appropriate resolution for the issuing and sale of bonds authorized by Senate Bill 224, House Bill 208, were duly and regularly adopted, and that in accordance with such resolutions the board of county commissioners has advertised the said bonds for sale, such sale to take place on 11 June, 1923.

"That this action is brought by R. H. Leonard and others, praying for an order enjoining and restraining the county commissioners from selling said bonds, the plaintiff alleging that the board of commissioners is without authority to sell said bonds upon the ground that the require-

ments of the Constitution of the State of North Carolina, Article II, section 14, were not complied with, in the passage of said act, by the Senate on its second reading for that the Journal fails to show an aye and no vote, as required by Article II, section 14, of the Constitution.

"It is now ordered, adjudged, and decreed that petitioner's request for an injunction restraining the defendant from disposing of the bonds in question be and the same is hereby refused, the court holding that the bonds in question, when issued, will be valid and binding obligation of the county of Surry, and that the legislative authority to issue same is in compliance with the Constitution of North Carolina."

Plaintiff excepted and appealed.

Folger & Folger for plaintiff.
W. F. Carter and Manning & Manning for defendant.

HOKE, J. Plaintiff is seeking to restrain the proposed bond issue, because the statute under which defendants are proceeding was not enacted in accord with Article II, section 14, of the Constitution, which provides, among other things, that all bills of this character shall be read three several times in each house of the General Assembly, and pass three several readings, which readings shall have been on three different days and agreed to by each House respectively, and unless the ayes and noes on the second and third readings of the bill shall be entered in the Journal, the single objection being that on the second reading of the bill the entry on the Senate Journal is as follows:

"Senate Bill 224, House Bill 208, a bill to authorize the county commissioners of Surry County to issue $150,000 of county bonds for the purpose of construction and improving the public roads of Surry County upon the second reading.

"Those voting in the affirmative are Senators Armfield, Baggett, Boyette, Brown of Columbus, Brown of Rockingham, Castelloe, Delaney, Ebbs, Grady, Graham, Griffin, Hargett, Harris of Franklin, Harris of Wake, Harrison, Heath, Hodges, Johnson of Beaufort, Jones of Alleghany, Jurney, Lattimore, McDonald, Mendenhall, Moss, Parker, Ray, Sams, Squires, Tapp, Varser, Walker, Williams, Woltz, Woodson—35."

Thus, as appellant contends, showing no entries of any negative votes.

The question presented has been directly resolved against appellant's position in *Comrs. v. Trust Co.,* 143 N. C., 110. In that case, as here, the entry showing that a large majority of the Senate voted for the bill, giving the names of the Senators so voting, with no entry of negative votes, the Court held: "An entry on the legislative journal that 'The bill passed its second reading, ayes 39, noes ....., as follows': then follows a list of those voting in the affirmative, without any reference to those voting in the negative, indicates that the bill passed by a unanimous vote

in that there were no names to be recorded in the negative, and is a compliance with the requirements of Article II, section 14, of the Constitution, that the ayes and noes shall be entered on the journals. *Debnam v. Chitty,* 131 N. C., 657, overruled."

The authority is decisive, and the judgment of his Honor is

Affirmed.

V. WALLACE & SONS v. SUDIE ROBINSON ET AL.

(Filed 26 May, 1923.)

1. Judgments—Consent—Principal and Surety—Claim and Delivery—Statutes.

The principle, applying to ordinary contracts, that a surety is released from liability by an extension of time given to his principal does not apply to a surety on a replevin bond given under the provisions of C. S., 836, where the defendant retains possession of the property the subject of claim and delivery by reason of the bond, and under its conditions, and thereafter a judgment by consent of the parties is entered by the court; and where the consent judgment stays execution for sixty days, and in that time the defendant upon whom the judgment places liability has disposed of the same, the surety remains liable to the extent of his principal's obligation.

2. Same—Principal and Agent.

The sureties on a replevin bond are considered as parties of record within the limits of their obligation, C. S., 836, and by becoming surety they duly constitute their principal, the defendant in the action, as their agent with power to bind them by their compromise or adjustment of the matter in any manner within the ordinary and reasonable purview of the action, and to have the same evidenced, secured, and enforced by final process in the cause; and he is bound by a judgment entered therein by consent of the parties, though without his knowledge, for the liability therein imposed on his principal to the extent of the undertaking he has signed as such surety.

3. Claim and Delivery—Principal and Surety—Judgments—Remedies—Proceedings—Appeal and Error—Fraud—Actions—Motions.

The remedy of a surety on a replevin bond to contest his liability as such under a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by his motion in the case.

APPEAL by J. A. Lentz, surety on replevin bond, from *Finley, J.*, at February Term, 1923, of CATAWBA.

Motion by J. A. Lentz to set aside a judgment as to him heretofore entered against defendants and said J. A. Lentz, surety on defendant's replevin bond, given in an action of claim and delivery between plaintiffs and defendants. There was judgment in denial of the motion, and the surety, J. A. Lentz, appealed.

W. B. Gaither and Feimster & Feimster for plaintiff.
E. B. Cline for appellant.

HOKE, J. From a perusal of the record and case on appeal, the pertinent facts appear to be as follows:

"The action was originally commenced by L. C. Wallace and J. V. Wallace, partners, trading as V. Wallace & Sons (against Sudie Robinson and C. H. Robinson by summons from the office of the clerk on 27 November, 1919, and at the same time an affidavit was filed in claim and delivery in which plaintiffs asserted a right of property in and to a certain stock of general merchandise and store fixtures therein described by virtue of a chattel mortgage duly of record in Catawba County, executed by the defendant C. H. Robinson.

"The affidavit further alleges that the property was wrongfully detained by the defendant Sudie Robinson, and was worth about $1,000.

"Plaintiffs gave the usual undertaking, and the clerk issued the writ to take the property from the defendants.

"Thereupon and on the same day the defendants executed their undertaking or replevin bond as provided by the statute in the sum of $2,000, with J. A. Lentz as their surety thereon, and the property was left by the sheriff in possession of the defendant Sudie Robinson.

"In due course the plaintiffs filed their complaint that the defendant C. H. Robinson had, in June, 1919, executed his demand note to them for $700 and secured the same by chattel mortgage upon the merchandise and fixtures hereinbefore mentioned; that he was still due and owing thereon $421.79, with interest; that plaintiffs were the owners of the property which was worth about $1,000; that defendant C. H. Robinson had attempted to convey and transfer it to his codefendant, Sudie Robinson.

"Plaintiffs prayed judgment for $421.79, interest, costs, and possession of the property."

Thereupon the defendants filed answers raising issues as to the validity of the note and mortgage sued on and the amount still due, by C. H. Robinson to plaintiffs, for goods and merchandise purchased of them.

In this situation the cause was continued at each successive term of court for nearly three years, and at the September Term, 1922, a judgment signed "by consent" by the attorneys for plaintiffs and defendants C. H. Robinson and Sudie Robinson and by C. H. Robinson himself, and by Judge Webb was entered and filed which will be found in the record proper in this case.

"This judgment agreed that the plaintiffs were the owners of the stock of goods and fixtures, and entitled to their possession; that the value thereof at the time of the detention was $1,000; that the defendants were

indebted to plaintiffs in the sum of $313.60, and decreed that plaintiffs recover the stock of goods and merchandise, or in case possession thereof could not be had, that they recover of the defendants and J. A. Lentz, surety on the defendant's undertaking, the sum of $1,000, the value of the stock of goods, to be discharged upon the payment by the defendants and the surety of $316.60, interest, and cost.

"The judgments concluded in these words: 'Execution not to issue within sixty days from the first day of this term of court.'"

That the personal property in question was disposed of by defendant to third persons during the sixty days delay, and without such property defendants are insolvent; and further, that the compromise judgment and the delay of execution provided for therein were without the knowledge or consent of appellant, and without actual notice to him of any such proceedings. And upon these facts the Court is of opinion that the motion has been properly denied, and his Honor's ruling to that effect should be affirmed. True, it has been frequently held with us that a consent judgment in many respects is considered as a contract between the parties, put upon the record with the sanction and approval of the court. *Holloway v. Durham*, 176 N. C., 550; *Bank v. McEwen*, 160 N. C., 414; *Bunn v. Braswell*, 139 N. C., 139. And it is also fully recognized, as shown in the learned brief of appellant's counsel, that in case of an ordinary contract *inter partes*, where an obligee, without the knowledge or assent of a surety, has entered into a binding or enforceable agreement to grant to the principal an extension of time or other substantial indulgence to the surety's prejudice, the latter will be thereby released or discharged from the obligation. *Foster v. Davis*, 175 N. C., 541; *Revell v. Thrash*, 132 N. C., 803; *Smith v. Parker*, 131 N. C., 470.

But while this position very generally prevails, universally, so far as examined, in ordinary contracts between individuals, in the instant case, that of a replevin bond given in a pending suit pursuant to statutory provision for the forthcoming of the property if the same can be had, and if not, for the payment to plaintiff of such sum as may be recovered against defendant for the value of the property, etc., C. S., 836, the authorities on the subject in this jurisdiction are to the effect that the sureties to such a bond within the limits of the obligation are to be considered parties of record, and that their principal, the defendant in the case, is their duly constituted agent having power to bind them by compromise or adjustment of the matter, in any manner within the ordinary and reasonable purview and limitations of the action, and to have the same evidenced, secured, and enforced by judgment and final process in the cause. *Nimocks v. Pope*, 117 N. C., 315; *McDonald v. McBryde*, 117 N. C., 125; *Robbins v. Killebrew*, 95 N. C., 24; *Council v. Averett*, 90 N. C., 168; *Hurker v. Arendell*, 74 N. C., 85. As apposite

to the question presented in affirming a judgment on the replevin bond entered by consent of plaintiff and the principal defendant, it was held in the *Nimocks case, supra:* "A surety on a replevin bond, given for the return of property in an action of claim and delivery, by signing such bond makes the defendant principal his agent to compromise plaintiff's claim for damages, and upon a compromise being made by such defendant, without the knowledge or consent of the surety, the court is authorized to enter up judgment against the defendant and his surety in accordance with such compromise."

In *Council v. Averett, supra, Chief Justice Smith,* in speaking on the subject, said: "Now, the parties dispense, by agreement, with the judgment of restitution, and consent to a judgment for the value of the goods in money, the other branch of the alternative stipulation. The contract of the sureties, conforming to the directions of the statute, is that the plaintiff shall prosecute his action, 'return the property to the defendant, if such return be adjudged, and pay to him such sum as may for any cause be recovered against the plaintiff in this action.' The stipulation is twofold, and is explicit to pay whatever sum for any cause may be adjudged, and the plaintiff assents to the recovery of what is accepted as the value of the goods. The plaintiff prosecutes his own action, and the sureties assume responsibility for whatever may be legitimately and bona fide adjudged against their principal, who alone is the manager of his action, and by whose conduct of it they must abide. His right to compromise in preference to hazarding the results of an inquiry into the value of the goods before a jury cannot be questioned, nor is a judgment thus rendered any less binding on the sureties. This the sureties agree to pay, and the summary judgment against them, also, was entirely correct and proper."

There is nothing unusual in the compromise or adjustment of an ordinary suit to stipulate or provide as a part of the agreement that execution on the judgment be stayed for a reasonable length of time, and there is nothing in the present case that offends against the position relieving sureties by reason of the unwarranted indulgence of their principal, for, according to the tenor and effect of these statutory replevin bonds as construed in the decisions cited, the sureties are held to have authorized their principal to act for them in the matter, and to give their assent to the compromise complained of.

In thus dealing with the questions chiefly presented, we must not be understood as conceding that even if this entry had been made without authority the question could be properly raised by motion in the cause. The exceptions here urged would seem to point to an erroneous judgment which may only be challenged by appeal or by an independent action for fraud.

In the case of *McDonald v. McBryde, supra,* it was held: "Where the defendant, in claim and delivery proceedings, consents to a judgment against himself and sureties on the replevin bond, the sureties cannot be allowed to intervene as parties and move to have the judgment vacated, they not having offered to interplead and claim the property in the manner prescribed by section 331 of The Code.

"In such case, the fact that the defendant consented to judgment before the maturity of the debt is no ground for complaint by the sureties, such consent not being necessarily fraudulent.

"Where a judgment has been entered, by the consent of the defendant, on the replevin bond given by him in claim and delivery proceedings, it cannot be set aside for fraud at the instance of the sureties by motion in the cause, but only by a new and direct action for the purpose."

And the principle as stated is held to apply to judgments by consent as well as to adversary judgments, in *Council v. Averett,* 90 N. C., *supra,* and *Stump v. Long,* 84 N. C., 616.

Without finally determining the matter as applied to the facts of the present record, we prefer to deal directly with the question and hold that the judgment complained of is according to the course and practice of the court, and full authority to consent to same was conferred upon the principal when the sureties signed the replevin bond as shown in the record. The judgment of his Honor in denial of appellant's motion is therefore

Affirmed.

THE ECONOMY ELECTRIC COMPANY ET AL. V. THE AUTOMATIC ELECTRIC POWER AND LIGHT PLANT ET AL.

(Filed 8 June, 1923.)

1. Process—Summons—Deceit—Fraud—Irregularities—Waiver.

The law will not lend its sanction or support to an act, otherwise lawful, which is accomplished by unlawful means, and where the service of summons on defendant has been procured by plaintiff's fraud or deceit, the defendant may specially appear in apt time and show the fact; but his general appearance and plea to the merits of the action will be deemed a waiver of any irregularity in the service of the process.

2. Same—Attachment—General Appearance—Pleas—Merits.

The plaintiff made a partial payment in advance on five automatic lighting machines purchased from the nonresident defendant, had one of them shipped in advance which he upon examination found to be worthless and not as warranted, and to obtain jurisdiction in our State courts, caused the defendant to ship the other four, bill of lading attached to draft, paid the draft, attached the funds in a local bank in his action for damages, etc. Upon defendant's general appearance and the trial of the

case upon its merits: *Held*, the defendant had waived his rights to have the court dismiss the action for alleged fraud or deceit in the procurement of service of summons on him.

3. Intervener—Attachment—Title—Burden of Proof.

The burden of proof is on the intervener in attachment to show his title to the property attached.

APPEAL by defendants and interpleader from *Daniels, J.*, at October Term, 1922, of NASH.

Civil action to recover damages for an alleged breach of contract.

On 2 September, 1919, the plaintiffs contracted for the purchase from defendant Automatic Light Company of five automatic lighting machines. The total price to be paid for the five machines was in excess of $1,700. The jury have found, upon plenary evidence, that the defendant's agent falsely and fraudulently represented the machines to be automatic in operation. The proof is that, but for these false and fraudulent representations, plaintiffs would not have contracted to buy the machines. Plaintiffs paid $568 in cash upon the five machines, under an agreement that one of the machines was to be sent promptly by express so as to enable plaintiffs to make exhibition of and to advertise it at the approaching agricultural fair. The remaining four machines were to follow by freight. The machine sent out by express arrived too late for demonstration at the fair, but was repeatedly tested and tried out by plaintiffs and found to be practically worthless. Plaintiffs then called upon defendant light company for a cancellation of their contract and the return of their installment payment of $568. Defendant, while expressing its willingness to withhold shipment of the last four machines, refused to pay back the $568, which had been paid by plaintiffs.

In the meantime, the four machines, which were to come by freight, were shipped "order notify," with drafts for the purchase money attached to bills of lading, which, with the drafts attached amounting to $1,198.44, were sent for collection to the Farmers and Merchants Bank of Rocky Mount. At first the plaintiffs, seeking to get a cancellation of the contract and the repayment of their cash installment, refused to pay the drafts, or to take up the bills of lading, but finally plaintiffs did pay the drafts for the four machines, and before the Farmers and Merchants Bank could remit the money to the drawer of the drafts, attached the said sum of $1,198.44 in the bank's hands and sought to apply the same to the payment of the damages suffered on account of the false and fraudulent representations made to them in respect to the machines. The defendant Automatic Light Company, through its counsel, made a general appearance, and the Ludington State Bank, the nonresident bank voluntarily came into court and, through its counsel, intervened, made a general appearance, took the funds upon execution of

satisfactory bond, and filed its formal affidavit, claiming that it had purchased the drafts and bills of lading in question from the Automatic Light Company for value, and without notice of any defect in the title.

The jury found, upon issues submitted, that the representations made by defendant's agent were false and fraudulent; that the intervening bank was not a bona fide holder of the drafts; that plaintiffs had not waived the fraudulent representations alleged in the complaint; and awarded the plaintiffs, as damages, the sum of $1,766.44, which is the aggregate of the amounts paid out, to wit, $568 and $1,198.44.

Judgment on the verdict, and by consent of plaintiffs, the five machines in question were ordered to be sold and proceeds derived therefrom credited on plaintiffs' judgment, and any excess paid to defendants as their interests may appear. Defendants appealed, assigning errors.

Spruill & Spruill and J. W. Keel for plaintiffs.
Thorne & Thorne for defendants.

STACY, J., after stating the case: At the close of plaintiffs' evidence, and again at the close of all the evidence, defendant Automatic Electric Power and Light Plant, and Ludington State Bank, intervener, moved for judgment as of nonsuit, and the refusal of the court to allow their motion is the ground of the first exception. In support of this exception, defendant and intervener contend that the plaintiffs have obtained jurisdiction of their property and thereby induced them to come into court by fraud or other improper means, and that the only adequate remedy which the law affords an aggrieved party in such a case is to set aside the process and dismiss the action. 7 R. C. L., 1040. It is alleged that the plaintiffs fraudulently and deceitfully persuaded the Automatic Electric Power and Light Plant to send the drafts in question with bills of lading attached, through the intervening bank, into this jurisdiction so that plaintiffs might pay them, or take them up, immediately levy an attachment against the proceeds of such collection in the hands of the collecting bank, and thereby force the defendants to litigate the matters in dispute in the courts of this State.

Where service of process is procured by fraud, that fact may be shown, and, if shown seasonably, the court will refuse to exercise its jurisdiction and turn the plaintiff out of court. The law will not lend its sanction or support to an act, otherwise lawful, which is accomplished by unlawful means. *Chubbuck v. Cleveland*, 37 Minn., 466 (*S. c.*, 5 Am. St. Rep., p. 864). Such a fraud is one affecting the court itself and the integrity of its process. *Larned v. Griffin*, 12 Fed. Rep., 590; *Gilbert v. Vanderpool*, 15 Johns (N. Y.), 242; 1 Wait's Practice, 562. The objection, strictly, is not that the court is without jurisdic-

tion, but that it ought not, by reason of the alleged fraud, to take or to hold jurisdiction of the action. *Wheelock v. Lee,* 74 N. Y., 495; *Higgins v. Beveridge,* 35 Minn., 285. Also, *Steele v. Bates,* 16 Am. Dec., 723, and note. The defendant may appear specially and object to the jurisdiction when the court will refuse to assume it, and will dismiss the action or award appropriate relief, as we have said, for the law will not lend its countenance or its aid to further an act, otherwise lawful, which is accomplished by unlawful and fraudulent means. *Townsend v. Smith,* 47 Wis., 623; 32 Am. Rep., 793; Bigelow on Fraud, 166, 171, and cases; *Ilsley v. Nichols,* 12 Pick., 270, 276; 22 Am. Dec., 425; *Sherman v. Gundlach,* 37 Minn., 118.

In the instant case, however, the Automatic Electric Power and Light Plant and the Ludington State Bank, intervener, have clearly and undoubtedly waived their right to dismiss the case for the alleged fraud of the plaintiffs by appearing herein without objection of any kind and actually pleading to the merits. The jurisdiction of the court has already been exercised and the case heard. It would be useless to restate the reasons for this result, as the question is fully treated and discussed, and the law in regard to it settled in the cases of *Motor Co. v. Reaves,* 184 N. C., 260, and *Scott v. Life Asso.,* 137 N. C., 516. See, also, *Hatcher v. Faison,* 142 N. C., 364; 32 Cyc., 527, and the following cases upon the question that a general appearance cures all defects and irregularities in the process: *Wheeler v. Cobb,* 75 N. C., 21; *Penniman v. Daniel,* 95 N. C., 341; *Roberts v. Allman,* 106 N. C., 391; *Moore v. R. R.,* 67 N. C., 209; *Grant v. Grant,* 159 N. C., 528; *Harris v. Bennett,* 160 N. C., 339.

In *Moore v. R. R., supra, Justice Rodman* said: "The defendant nevertheless appeared and answered in bar. The irregularity was thereby waived. If no summons at all had been issued, the filing of a complaint and answer would have constituted a cause in court."

His Honor was correct in holding that the burden was on the intervener to make good its claim and to show title to the property attached. *Sterling Mills v. Milling Co.,* 184 N. C., 461; *Mangum v. Grain Co.,* 184 N. C., 181, and cases there cited.

After a careful perusal of the record, we have found no material or reversible error presented by any exception, and this will be certified.

No error.

ANNIE K. UNDERWOOD v. THE STATE LIFE INSURANCE COMPANY.

(Filed 8 June, 1923.)

1. Insurance, Life—Policies—Contracts—Premium Notes.

Policies of life insurance and premium notes given by the insured in connection therewith, upon forms furnished by the companies, are prepared by the insurers; and in case of ambiguity or uncertainty as to the right interpretation, they will be construed more strongly against the insurers, and in favor of the rights of those insured by them.

2. Same—Premiums Paid from Reserve Values—Extension Periods—Proportionate Reductions.

Upon the payment of two years premiums upon a life insurance policy, there were nonforfeiture options with extensions of time of the insurance upon nonpayment of premiums for various lengths of time depending upon the annual premiums theretofore paid, and the insured gave his note upon the company's form for the premium after the second year, with provisions that should the note not be paid at maturity the policy would lapse, with the right of the company to apply any reserve value due the insured to the payment of the then earned premium (not upon the note), "as above provided," reducing the insured value of the property to that extent: *Held*, under the seeming ambiguous provisions of the note, an application of the reserve value by the company to a part payment of the earned premium due the company, proportionately extended the life of the policy, and upon the death of the insured within the time so extended, his beneficiary can recover upon the policy. *Underwood v. Ins. Co.*, 177 N. C., 333, cited and distinguished.

3. Same—Insurance Commissioner.

As to whether the premium notes given in this case were invalid because not submitted to and approved by the Insurance Commissioner is not presented or decided on this appeal.

ADAMS, J., dissenting.

APPEAL by defendant from *Devin, J.*, at February Term, 1923, of CUMBERLAND.

Civil action to recover the amount of two life insurance policies. Judgment on the pleadings in favor of the plaintiff. Defendant appealed.

Bullard & Stringfield for plaintiff.
J. M. Broughton for defendant.

STACY, J. The essential facts of this case are as follows:

1. On 11 March, 1919, the defendant issued upon the life of John Underwood two policies of life insurance: No. 225378 for $3,500, and No. 225379 for $1,500; the plaintiff, wife of assured, being named as beneficiary in both policies. On each of these policies two full annual premiums were paid.

2. When the third annual premiums became due, on 11 March, 1921, the assured did not pay said premiums, but executed in respect to said policies two "premium notes," one in the amount of the annual premium due in advance on policy No. 225378, to wit, $149.24, and the other in the amount of the annual premium due in advance on policy No. 225379, to wit, $63.96, with each note containing the following stipulations:

"I understand and hereby agree that neither this note, nor any extension thereof, is given or accepted as a payment of said premium. And I agree that the nonpayment of this note, or any extension thereof at maturity, shall *ipso facto* lapse said policy, and there will be due the proportionate part of said premium (with interest, less any payments made on said premium) that the time from the date to the maturity of this note, or any extension thereof, bears to the whole time covered by said premium. I also agree that upon nonpayment of this note, or any extension thereof, if said policy should have any reserve value, the company may charge the proportionate part of this note or any extension thereof that may be due as above provided against such reserve value, and any extended insurance value it may have shall be accordingly reduced."

3. Both notes were to be paid within six months, but the maturity date of each was subsequently extended to 26 January, 1922. Neither of said notes, nor any part of the earned premium on either policy was paid at that time.

4. In each of said policies there is a provision for certain nonforfeiture options, available after two full premiums shall have been paid (the policy being then in force, and there being no indebtedness against the same); and, under the said nonforfeiture options, it is provided that if full premiums shall have been paid for two years the assured shall have, as the first option, extended insurance to the extent of one year and 128 days. Such extended insurance is nonparticipating, and not renewable except upon satisfactory physical examination.

5. The assured did not borrow any money from the defendant, and there was no indebtedness against the policies, unless said "premium notes" are to be considered as such.

6. Upon the nonpayment of the note given in connection with policy No. 225378 at its extended maturity date, there being due at that time the sum of $135.26 as the earned premium on said policy, the defendant notified the assured that the said policy had lapsed; and in accordance with the provisions of the note, given in connection therewith, the entire reserve value of the policy, amounting to the sum of $92.75, had been credited upon the earned premium then due, leaving a balance of $42.51 still due on said earned premium. And upon the nonpayment of the

note given in connection with policy No. 225379 at its extended maturity date, there being due at that time the sum of $52.96 as the earned premium on said policy, the defendant notified the assured that the said policy had lapsed; and in accordance with the provisions of the note, given in connection therewith, the entire reserve value of the policy, amounting to the sum of $39.75 had been credited upon the earned premium then due, leaving a balance of $13.21 still due on said earned premium.

7. The assured died 5 May, 1922, before the expiration of the period of extended insurance under the first option above mentioned.

8. Demand for payment of each of the policies having been made and refused, the beneficiary thereunder, plaintiff herein, filed suit to enforce collection. Judgment on the pleadings in favor of plaintiff, and defendant appealed.

The uniform rule of construction with respect to insurance policies and notes given in connection therewith is that if they are reasonably susceptible of two interpretations, the one more favorable to the assured will be adopted. "The policy having been prepared by the insurers, it should be construed most strongly against them." *Bank v. Ins. Co.*, 95 U. S., 673. "The tenets established for the guidance of courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity. And where the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted." *Deemer, J.*, in *Goodwin v. Assurance Society*, 97 Iowa, 226.

In *Bray v. Ins. Co.*, 139 N. C., 390, the same rule is stated by *Walker, J.*, as follows: "If the clause in question is ambiguously worded, so that there is an uncertainty as to its right interpretation, or if for any reason there is doubt in our minds concerning its true meaning, we should construe it rather against the defendant, who was its author, than against the plaintiffs, and any such doubt should be resolved in favor of the latter, giving, of course, legal effect to the intention, if it can be ascertained, although it may have been imperfectly or obscurely expressed. This is the rule to be adopted for our guidance in all such cases, and one reason, at least, for it is that the company has had the time and opportunity, with a view to its own interests, to make clear its meaning, by selecting with care and precision language fit to convey it, and if it has failed to do so, the consequences of its failure should not even be shared by the assured, so as to deprive him of the benefit of the contract, as one of indemnity for his loss," citing *Grabbs v. Ins. Co.*, 125 N. C., 389. To like effect are the following cases: *Trust Co. v. Ins. Co.*, 173 N. C., 558; *Jones v. Casualty Co.*, 140 N. C., 262; *Rayburn*

v. Casualty Co., 138 N. C., 379; *Kendrick v. Ins. Co.*, 124 N. C., 315, and authorities there cited.

Applying this principle of construction to the instruments before us, we are of opinion that the judgment in favor of plaintiff should be upheld.

It is conceded that if the assured had simply failed to pay the third premiums when they became due, and not executed the notes in question, both policies would have been in force at the time of his death, under and by virtue of the automatic option of extended insurance as provided for in each policy. But it is contended that the execution of the notes above mentioned has worked a forfeiture of both policies, and that the plaintiff is entitled to take nothing by this action. In dealing with this contention, for convenience, let us consider the policies separately. It is easier to speak of them singly, and what is said in regard to one will apply equally to the other.

Suppose the reserve value of policy No. 225378, on 26 January, 1922, the extended maturity date of the note in question, had been exactly $135.26, the amount of the then earned premium, why would not the extended insurance value of the policy be the same as it was on 11 March, 1921, to wit, one year and 128 days? It will be observed that the taking of this amount of money out of one pocket of the insurance company and putting it back into another did not have the effect of exercising for the assured the option of surrendering the policy and taking its reserve value in cash; for it is provided that this shall only have the effect of a proportional reduction in its extended insurance value. In this respect, the case is unlike *Sexton v. Ins. Co.*, 160 N. C., 598; *S. c.*, 157 N. C., 142, because there the policy was to become "null and void," subject only to its nonforfeiture provisions, upon failure to pay the premium note, and the cash reserve had been pledged to secure the repayment of money borrowed. See last paragraph of opinion, 160 N. C., 600. The present note is not collectible, and never has been. Only the fractional part of the annual *premium* is what is due and payable, and this has been satisfied in part. The policy was not lapsed until 26 January, 1922. But as the reserve value of the policy at that time was sufficient to pay only 92.75/135.26, or 68.5 per cent of the then earned premium, the extended insurance value is to be reduced 31.43 per cent, which leaves an extended insurance value of 338 days from the date the policy was allowed to lapse. The assured died 5 May, 1922, well within this time. Likewise, the reserve value of policy No. 225379 on 26 January, 1922, being sufficient to pay only 39.75/52.96, or 75.05 per cent of the then earned premium, the extended insurance value of one year and 128 days would be reduced 24.95 per cent, leaving an extended insurance value of one year and 5 days from the date the policy was allowed to lapse.

The case of *Ins. Co. v. Tyler,* 93 S. E. (Ga.), 415, is distinguishable in that in said case the parties agreed to extend the time of payment of premium, maintaining the policy in full force in the meantime, and, when paid, receipt was to be issued as if the premium had been duly paid in the first instance. There the company issued a receipt for the note, stating that such were its conditions; but not so here. It is agreed that each note in the present case is not given or accepted as a payment of the premium, and, in the event of its nonpayment at maturity, the note is not collectible, but something else, to wit, the then earned portion of the annual premium on each policy. If this be paid, clearly the life of the policy in each instance is brought up to that date with its full extended insurance value; but if paid only in part with the reserve value of the policy, its extended insurance value is to be reduced accordingly.

The contention of the defendant that the appropriation of the reserve wipes out each policy *in toto* overlooks the fact that this very reserve is used to pay, not the note given in connection therewith, but a part of the then earned premium on said policy. By the same token that the use of the reserve is said to cancel the policy, the payment of the then earned premium, in whole or in part, brings it back to life with the option of extended insurance, unimpaired or ratably reduced, as the case may be. The defendant ought not to be allowed to switch reserve to premium in such a manner as to defeat the plaintiff's claim for indemnity. Nothing short of clear necessity should drive us to this conclusion; for to take the policy reserve in each instance and credit this amount on the earned premium then due on said policy and still say that you have nothing, smacks of legerdemain. If it be true that in each case the note was not "given or accepted as a payment of said premium," and the policy reserve, as contended by the defendant, is to be applied to the payment of the note, and not to the premium, a different result might follow. But such is not the condition of the bond, when construed in the more favorable light for the assured. 14 R. C. L., 926.

In reply to the contention that the last sentence in the note we are now considering apparently runs counter to this position, it may be said that the present construction is supported by the two sentences next immediately preceding the last one, and that the use of the words "as above provided" in the last sentence should be held to overbalance the contrary construction as contended for by the defendant. Under the seemingly ambiguous provisions of the notes in question, the defendant should not be allowed "to have its cake and eat it too." *Arnold v. Ins. Co.,* 60 S. E., (Ga.), 470; *N. Y. Life Ins. Co. v. Van Meter's Admr.,* 137 Ky., 4.

What was said in *Underwood v. Ins. Co.,* 177 N. C., 333, touching the "blue notes" in that case, in no way conflicts with our present posi-

tion, for there the notes were quite different and the assured had borrowed money against the reserve value of the policy and assigned the same as collateral security for its repayment. This is not our case. For like reason, *Garland v. Ins. Co.,* 179 N. C., 67, is also distinguishable.

It has been suggested that the above provisions of the "premium notes" in question are invalid as against the assured because the same have not been submitted to and approved by the Insurance Commissioner of North Carolina, and copies filed in the Insurance Department, as required by C. S., 6312. We prefer to express no opinion upon the merits of this contention, for we think the plaintiff is entitled to recover on another ground, and it is possible that the facts may not be sufficiently disclosed by the pleadings to enable us presently to deal with the question satisfactorily. Judgment below was rendered on the pleadings. It was said in *Blount v. Fraternal Asso.,* 163 N. C., 170, that the burden was on the plaintiff, both to allege and to prove a noncompliance with the provisions of this section, as there is a presumption in favor of the validity of contracts. *Loyd v. Loyd,* 113 N. C., 189. See, also, *Robinson v. Life Co.,* 163 N. C., 415.

After a careful examination of the record, and considering it in the light of the authorities bearing upon the subject, we are of opinion that the judgment of the Superior Court in favor of the plaintiff should be upheld; and it is so ordered.

Affirmed.

ADAMS, J., dissenting.

THE WASHINGTON LIFE INSURANCE COMPANY *v.* BOX COMPANY AND ADRIAN VAN DEN BOOM.

(Filed 8 June, 1923.)

1. Insurance, Life — False Representations — Statutes — Policies—Contracts.

Under the provisions of our statute that all statements or descriptions in an application for a policy of life insurance, or in the policy itself, shall be deemed representations and not warranties, and that a misrepresentation, unless material or fraudulent, will not prevent a recovery, every fact untruly asserted or wrongfully suppressed must be regarded as material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of premium.

2. Same.

In an action to set aside a policy of life insurance for representations that were false, fraudulent, and material, it appeared that the insured had misstated in his application that he had never had spitting of blood,

or Spanish influenza, and it appeared that pending the action he had died of tuberculosis: *Held*, the representations of the applicant must be regarded as material, and the policy will be set aside for the false statements regarding them.

3. Same—Fraud.

The existence of actual fraud upon the part of the applicant for a life insurance policy is not necessary to avoid the policy when he has induced the company to issue it by false representations that are material for its consideration in passing upon the risk.

4. Insurance, Life — False Representations — Issues—Verdict—Specific Findings—General Findings—Trials.

Where the jury have found upon distinctive and separate issues, upon the evidence and under the charge of the court, that the applicant for a policy of life insurance has made material misrepresentations that will avoid the policy, and upon a separate issue that the insured had withheld no fact relating to his physical condition or personal history which he should have communicated, the specific finding as to the false representations will not be considered as included in the verdict on the general issue; and were it otherwise, it would not be allowed to affect the result of avoiding the policy.

5. Insurance, Life—Policy—Delivery—Premiums—False Representations—Policies—Contracts.

The principle obtaining that the delivery of a policy of life insurance without qualification, upon the payment of the first premium, effects a completed contract of insurance, does not affect the right of the company thereafter to have the policy set aside for fraud or false and material statements made by the applicant as an inducement to the contract.

CLARK, C. J., dissenting.

APPEAL by defendants from *Harding, J.*, at October Term, 1922, of STOKES.

The death of the individual defendant, Adrian Van Den Boom, having been suggested, his widow and administratrix comes into court and makes herself party defendant.

The action is to set aside an insurance policy in plaintiff company on the ground that the same was procured by alleged misrepresentations that were false, fraudulent, and material in various specified particulars. The pertinent allegations having been denied, the cause was submitted to the jury and verdict rendered on the following issues:

"1. Did Adrian Van Den Boom, in his application for the insurance policy in controversy in answer to inquiries contained therein, represent that he was in good health, and that he had no history of consumption? Answer: 'Yes' (by consent).

"2. Did Adrian Van Den Boom incorrectly, falsely, and fraudulently represent in the application for insurance policy in controversy, that he was in good health, and that he had no history of consumption? Answer: 'No.'

"3. Did Adrian Van Den Boom at said time have tuberculosis or consumption? Answer: 'No.'

"4. Did Adrian Van Den Boom have tuberculosis at the time he was examined by Dr. Banner in 1919? Answer: 'No.'

"5. If so, did Dr. Banner inform him that he had tuberculosis, as alleged in the complaint? Answer: 'No.'

"6. Did Adrian Van Den Boom in his application for the insurance policy in controversy in answer to inquiry in that behalf represent that there was no fact relating to his personal or family history or habits which had not been stated in answers asked of him, and with which the company should be acquainted? Answer: 'Yes' (by consent).

"7. Were there facts relating to the physical condition or personal history of said Adrian Van Den Boom which he should have communicated to the plaintiff, and which he failed to communicate in answer to said questions? Answer: 'No.'

"8. Did Adrian Van Den Boom, in his application for the insurance policy in controversy, and in answer to a question asked him in that behalf, represent that he had never had spitting of blood? Answer: 'Yes' (by consent).

"9. Was said representation true? Answer: 'No.'

"10. Did Adrian Van Den Boom, in his application for the insurance policy in controversy, and in answer to questions asked him in that behalf, represent that he had never had chronic cough or hoarseness? Answer: 'Yes' (by consent).

"11. Was said representation true? Answer: 'Yes.'

"12. Did Adrian Van Den Boom in his application for the insurance policy in controversy and in answer to a question asked him in that behalf, represent that he had never had Spanish influenza? Answer: 'Yes' (by consent).

"13. Was said representation true? Answer: 'No.'

"14. Did Adrian Van Den Boom incorrectly, falsely, and fraudulently represent in the application for the insurance policy in controversy that he was not afflicted with a chronic cough and hoarseness? Answer: 'No.'

"15. Did Adrian Van Den Boom incorrectly, falsely, and fraudulently represent in the application for the insurance policy in controversy that he had not had Spanish influenza? Answer: 'No.'

"16. Did Adrian Van Den Boom, in his application for the insurance policy in controversy, and in answer to questions in that behalf, represent that he had consulted no physician within the last seven years except Dr. Banner of Greensboro, N. C.? Answer: 'Yes' (answered by consent).

"17. Was that representation true? Answer: 'No.'

"18. Did Adrian Van Den Boom consult Dr. Simmons in January, 1919? Answer: 'Yes.'

"19. Was the policy in controversy obtained from the plaintiff by means of false and fraudulent representations or concealments, as alleged in the complaint? Answer: 'No.'"

Judgment on the verdict that the policy in question be surrendered and canceled. Defendants excepted and appealed.

E. D. Broadhurst, J. J. Parker and Manly, Hendren & Womble for plaintiff.

Swink, Clement & Hutchins, O. O. Efird, and N. O. Petree for defendant.

HOKE, J. The statute more directly pertinent to the question presented provides that "All statements or descriptions in any application for a policy of insurance, or in the policy itself, shall be deemed representations and not warranties, and a representation, unless material or fraudulent, will not prevent a recovery on the policy," and in authoritative cases construing the law it is held that every fact untruly asserted or wrongfully suppressed must be regarded as material if the knowledge or ignorance of it would naturally influence the judgment of the underwriter in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of the premium. *Schas v. Ins. Co.*, 166 N. C., 55; *Bryant v. Ins. Co.*, 147 N. C., 181; *Fishblate v. Fidelity Co.*, 140 N. C., 589.

Considering the record in view of these principles, it appears that in the application for this insurance policy and in answer to direct questions on the subject, asked and answered as an inducement to the contract, the intestate stated that he had never had spitting of blood, and that he had never had Spanish influenza, and that both statements were false. It is very generally recognized that the spitting of blood always is regarded as a serious symptom, and not infrequently indicates the presence or near threat of tuberculosis (the disease of which intestate died), and that Spanish influenza has a tendency, at least for a period following the disease, to weaken the resisting powers of a patient and render him more likely to succumb to an attack of serious illness, and assuredly its existence, or the fact that an applicant had been subject to such a disease, would naturally call for further and fuller investigation of the case, and this being true, in our opinion both of these should be regarded as material, and for the false statements concerning them the policy has been properly set aside.

It is urged for appellants that the jury in their verdict has throughout negatived any and all existence of fraud on the part of the applicant,

but the statute itself and the general principles applicable are to the effect that fraud is not always essential, and that the contract will be avoided if statements are made and accepted as inducements to the contract which are false and material. *Ins. Co. v. Woolen Mills,* 172 N. C., 534; *Schas v. Ins. Co., supra.*

It is further insisted for the appellants that the jury have found in response to the seventh issue that the applicant withheld no fact relating to his physical condition or personal history which he should have communicated. An examination of the facts in evidence and the charge of the court concerning them will disclose that the issue was submitted in reference to matters other than those included in and determined by the specific findings to which we have referred; but if it were otherwise, it is directly held in *Ins. Co. v. Woolen Mills, supra,* that a general finding of the kind presented in this seventh issue will not be allowed to affect the result when there are also specific findings of material facts which avoid the policy as a matter of law.

We are not inadvertent to the position prevailing in this State to the effect that where, on payment of the first premium, a policy of insurance is delivered without qualification, there is a completed contract of insurance, and that the parties are concluded as to the delivery of the policy during the good health of the insured except in cases of fraud. An instance and application of the principle appears at the present term in *Ins. Co. v. Grady, ante,* 348.

The ruling, however, only refers to the inception of the contract, that is, that on the facts suggested there is a completed contract of insurance between the parties, and does not and is not intended to affect the right of the company to have the policy set aside as stated either for fraud or false and material statements made by the applicant as an inducement to the contract. There is no error, and the judgment directing cancellation of the policy is affirmed.

No error.

CLARK, C. J., dissenting: Under the statute any statement or description in the application, or in the policy itself, must be deemed merely representations and not warranties, and "a representation, unless material or fraudulent, will not prevent a recovery under the policy." C. S., 6289.

Therefore, it will not defeat a recovery that a representation is untrue unless it is material or fraudulent. The jury have found that the representations in this case were untrue in that the assured stated that he had not had spitting of blood or Spanish influenza, but they also found that this was not fraudulently done, and they found as a fact (issue 19) that "the policy was not obtained by false and fraudulent representations or concealments."

The jury having found that the statements were not fraudulent, it should have been left to the jury to pass upon the question whether they were material. There are cases where parties have had the spitting of blood or Spanish influenza, but it was not material to the risk, for these matters are not necessarily fatal. That was a matter of fact which should have been found by the jury upon sufficient evidence, and unless so found, it could not prevent a recovery. We are judges of law, but not judges of fact; we are doctors of law, but not doctors of medicine.

The jury, as judges of the facts, alone could determine whether the misrepresentation which they find is not fraudulent was material or not, and they could have been aided in such finding by the testimony of doctors who were conversant with such matters. The case should go back that the jury should pass upon the issue whether or not the untrue statement was material to the risk or not. The judge had no authority to determine this, and the jury have not done so.

JOSEPH R. ROSS AND GEORGE E. WILSON, JR., FOR THEMSELVES AND ALL OTHER STOCKHOLDERS OF THE LOWELL COTTON MILLS, v. SLOAN M. ROBINSON, THE LOWELL COTTON MILLS, THE LOWELL YARN COMPANY ET AL.

(Filed 8 June, 1923.)

1. **Appeal and Error—Examination of Books of Adverse Party—Statutes.**

An appeal to the Supreme Court presently lies to an order made by the Superior Court judge providing for examination and copies of books and papers in the possession of the adverse party to the action under the provisions of C. S., 1823 *et seq.*, and unless the statutory provisions have been complied with, or if the order goes beyond the powers contemplated and conferred by law, it will be set aside.

2. **Appeal and Error—Dismissal—Discovery—Examination of Books, etc., of Adverse Party.**

An appeal from an order of the Superior Court judge allowing examination of books, papers, etc., of the adverse party under the provisions of C. S., 1823 *et seq.*, cannot be maintained, when it appears from the record that it is frivolous and for the mere purpose of delay; and the appellee may docket the appellant's case and have it dismissed, under the rule of the Supreme Court relating to such matters.

3. **Discovery—Examination of Books, etc., of Adverse Party—Statutes—Courts—Jurisdiction.**

In this action against a corporation and its selling agent to compel the agent to account for and pay over to the corporation moneys received and unlawfully withheld from it: *Held*, the court having jurisdiction of the parties may order the examination, etc., of the books and papers, C. S., 1823 *et seq.*, and enforce it by decree or appropriate procedure in the

cause, though the books are in the possession of the adverse parties beyond the limits of the State.

4. Appeal and Error—Dismissal—Frivolous Appeal—Discovery—Supreme Court—Motions—Corporations—Shareholders—Principal and Agent—Accounting.

In an action against a corporation and its selling agent by its minority stockholders, which the corporation had refused to institute, to compel the agent to properly account for and pay over to its codefendant large sums of money it had received and wrongfully withheld from the corporation, to its damage and that of its shareholders, upon proper motion and petition the Superior Court entered an order providing for an inspection and taking copies at plaintiffs' expense of the books of the defendants for a certain period, as necessary to obtain pertinent and necessary facts for an intelligent and proper trial upon the issues raised by the answers, from which the defendants appealed. Upon motion duly made by plaintiffs in the Supreme Court to docket and dismiss defendants' appeal: *Held*, upon the record, the appeal was shown to be frivolous, and for the purpose of delay, and the motion was allowed.

THIS was a motion upon notice duly served made by plaintiff at the present term to docket and dismiss defendant's appeal from an order in the cause at April Term, 1923, of the Superior Court of Mecklenburg County, providing for an inspection and copy of the books of defendant, the Lowell Yarn Mills, on the alleged ground that said appeal is frivolous and taken for the mere purpose of delay. Motion allowed.

W. S. O'B. Robinson, Jr., and John M. Robinson for plaintiffs.
Tillett & Guthrie and Mangum & Denny for defendants.

HOKE, J. The action is by the minority stockholders of the Lowell Cotton Mills against the directors and majority owners of stock of the Lowell Cotton Mills and Lowell Yarn Company, to compel the Lowell Yarn Company to properly account for and pay over to its codefendant, the Lowell Cotton Mills, large sums of money received and wrongfully withheld by said yarn company as factors or selling agents of the product of the Lowell Cotton Mills and the stockholders therein, and which said action the cotton mills and its directors had formally refused to institute, to the great damage of said mills and its stockholders and owners. Complaint having been duly filed, defendants answered denying, in effect, the rightfulness of plaintiff's suit, and thereupon, at April Term, 1923, of the Superior Court of Mecklenburg County, on motion and petition duly verified, an order was made providing for an inspection and taking copies at plaintiff's expense of the books of said company from the first of 1917 to the present time, as pertinent and necessary to obtain the facts required for an intelligent and proper trial and disposition of the cause.

From this order an appeal was duly entered by defendant, and thereupon the plaintiff having procured a copy of the record and the order and petition and papers appertaining thereto, presented the same at the present term, and after notice duly served, entered a motion to docket and dismiss said appeal for the alleged reason that the same is frivolous and for the mere purpose of delay.

It is held with us that an order of this kind, made under C. S., 1823 *et seq.*, is presently appealable, and that unless the statutory requirements for such an order are complied with, or if the same goes beyond the powers contemplated and conferred by the law, the order will be set aside. *Mica Co. v. Express Co.,* 182 N. C., 669; *Sheek v. Sain,* 127 N. C., 266. And our decisions on the subject are to the effect further that while such an appeal ordinarily lies as a matter of right, it may not be maintained where it is clearly made to appear that the same is frivolous and for the mere purpose of delay, and it will be dismissed upon motion. *Hotel Co. v. Griffin,* 182 N. C., 539; *Leroy v. Saliba,* 180 N. C., 15; *Ludwick v. Mining Co.,* 171 N. C., 415. And the course pursued by the appellee in the present instance to test the question has been also indirectly approved, and in our opinion is in accord with orderly procedure where, as in this case, the entire facts and entries relevant to this right of present appeal appears upon the face of the record. *Blount v. Jones,* 175 N. C., 708.

Considering the case in view of these principles, we are constrained to hold that this appeal is a frivolous one, and made for the mere purpose of delay, it having been made to appear that the facts desired are directly pertinent to the issue and necessary to an intelligent and proper disposition of the cause, and no valid objection has been made to appear either here or in the court below. And the position is not affected because of the suggestion that the books are not now in this State, but are in the city of Philadelphia, the authorities being to the effect that where the court has acquired jurisdiction of the parties, such an order may be made and enforced by decree or appropriate procedure in the cause. 18 Corpus Juris, p. 1116; 9 R. C. L.

In 18 Corpus Juris the principle is stated as follows: "In most jurisdictions the statutes provide for obtaining an inspection of books and papers of the adverse party. These statutes were enacted with a view of providing a more speedy and less expensive remedy than by proceedings in chancery, and are constitutional. They are remedial in their nature, and should be liberally construed. Under these statutes production, or inspection, of a deed, letters, telegrams, or the instrument sued on, may be ordered. The fact that the books or papers of which discovery is sought are out of the State does not justify the refusal of a motion for the production or inspection thereof where the court has

jurisdiction of the parties, whether the discovery is sought from a corporation or an individual, and notwithstanding the corporation is a foreign corporation not doing business in the State, and its books are without the State."

It appearing that all the facts, etc., pertinent to the question presented are apparent upon the face of the record, and that the appeal of defendant from the order is a frivolous one and made merely for delay, we are of opinion that the motion of appellee should be allowed, and it is so ordered.

Appeal dismissed.

YELLOW CAB COMPANY v. J. H. CREASMAN.

(Filed 8 June, 1923.)

1. Trademarks—Trade Names—Devices—Competition—Unfair Competition.

A manufacturer, dealer, or proprietor of a business may adopt and use a name, symbol, or device to designate and identify his wares or business, and when by his care, diligence, and the qualities of his goods or service he has acquired and established a patronage and good will of substantial value, it will be protected from unfair competition on the part of a rival who adopts for his own business, etc., a sign or symbol in such apparent imitation as will mislead the customers of the former and the public as to the identity of the goods sold or service rendered.

2. Same—Malicious Purpose.

Where one has acquired a substantial right by the conduct of his business under a certain device which has become known to his patrons and relied upon by them to identify and use the service or business he has thereunder established, it is not necessary for the protection of his right that his rival has a malicious purpose to injure him in adopting a same or similar device, though unfairness and fraud is the basis of the maintenance of his right, the presumption being that his rival intended to abide by the probable and natural result of his own deliberate act.

3. Injunction.

Where the main purpose of an action is to obtain a permanent injunction, and the evidence raises a serious question as to the existence of facts which make for plaintiff's rights, and are sufficient to establish it, a preliminary restraining order should be continued to the hearing.

4. Same—Automobiles—Color—Public Service.

In plaintiff's action to permanently enjoin the defendant from the use of a device that the plaintiff had adopted for its automobile service furnished to the inhabitants of a city, there was evidence in plaintiff's behalf, upon the hearing, tending to show that the color design for the plaintiff's automobiles was a yellow body with distinctive markings in black that had theretofore not been used in the city, which became well known to the public which patronized the plaintiff's line because of its fair dealings

and business methods, and that the methods of its competitors were discriminatory and unfair; that defendant, who had for a long while been running public-service automobiles of a grey color, put into its service two automobiles similar in design to the plaintiff's cars, and of such similar color and markings that the users of the plaintiff's cars were misled, the difference in their appearance being scarcely discernible by ordinary observation. There was evidence in behalf of defendant that yellow was commonly used for automobiles of this character, and was more durable, and that he had no improper designs upon plaintiff's business: *Held*, a serious question was raised as to the defendant's wrongful interference with the plaintiff's rights, and, upon its giving a proper bond, the preliminary restraining order should be continued to the hearing upon the issues.

CIVIL ACTION, heard on motion to dissolve a preliminary order before *Bryson, J.*, at March Term, 1923, of the Superior Court of Buncombe County. The action and the temporary order heretofore issued in furtherance of same is to restrain defendant from using on the streets of Asheville for public hire any automobile or taxicab painted yellow and made to resemble or imitate in form and color the taxicabs now and heretofore in use by the plaintiff, the Yellow Cab Company, etc. On the hearing there was judgment dissolving the preliminary order, and plaintiff excepted and appealed.

Harkins & Van Winkle and Guy Weaver for plaintiff.
F. A. Sondley and Mark W. Brown for defendant.

HOKE, J. At the hearing there were facts submitted on part of plaintiff tending to show:

That prior to summer, 1922, the public-service automobile business in the city of Asheville was in an unsatisfactory condition from lack of uniform rates, overcharges, and other discriminations, which was a source of considerable trouble to the police department of the city of Asheville, and concern to the public interests.

That with a view of remedying this condition the Chamber of Commerce, through its secretary, N. Buckner, in conjunction with the owners of the Asheville Daily Citizen, invited the Yellow Cab Manufacturing Company, of Chicago, Illinois, to send representatives to Asheville for the purpose, if found expedient, of arranging with some local person to place the Yellow Cab Taxi Service upon the streets of the city of Asheville.

That representatives of the Yellow Cab Manufacturing Company visited Asheville in response to this invitation, and, at the instance of the secretary of the Chamber of Commerce, called upon the defendant J. H. Creasman and endeavored to induce the said Creasman to inaugurate the Yellow Cab Taxi Service in the city, but the said Creasman declined to do so.

That thereupon the said representative called upon H. C. Allen, who was then in the transfer business in the city, who at once organized the plaintiff Yellow Cab Company, made up of local stockholders, and inaugurated in the city of Asheville, Yellow Cab Taxi Service, buying eleven metered cabs of the peculiar and distinctive type of cabs manufactured by the said Yellow Cab Manufacturing Company, of the yellow or orange color combined with black.

That prior to the time plaintiff's taxicabs were put upon the streets of Asheville no person had ever operated a cab of like design or color, or combination of colors, and no public-service automobile of such color, or combination of colors, had ever been operated in the city, and no cab carrying a meter showing the mileage traversed and fare charged had ever been used in said city.

That the plaintiff company began an extensive advertising compaign, and by furnishing to the public prompt, efficient, and courteous service at uniform and comparatively low rates, very soon built up in the said city of Asheville a large and satisfied patronage, and acquired a very valuable good-will.

That the distinctive taxicab service which the plaintiff gave to the public, and its business, came to be identified and symbolized by the peculiar and distinctive color, or combination of colors, style, dress, and general visual appearance of its yellow taxicabs.

That the defendant Creasman had been engaged in the public automobile service in the city of Asheville for some ten or twelve years prior to the institution of this action, and had identified his service by the use of automobiles most of which were painted a greyish or blackish color; that he had never up to the time of the acts complained of operated any public service cabs of black and yellow color, nor had any other person used in the public service business in the city of Asheville any automobiles of a yellow color or combination of yellow and black, prior to the inauguration of the Yellow Cab Taxi Service by the plaintiff in this case.

That some time about the middle of November, 1922, after the plaintiff had built up a good patronage, and had established a good-will, and its business had come to be identified, generally recognized and symbolized by the peculiar color or combination of colors of yellow and black or orange and black of its cabs, the defendant Creasman put upon the streets of the city of Asheville two taxicabs of practically the same structural design, form, and appearance as the cabs of the plaintiff, and colored in almost exactly the same shade of yellow as those of the plaintiff; that the bodies of the plaintiff's cabs were painted yellow, with the hoods, fenders, and tops black, these being the predominating and distinguishing features; that the defendant's two cabs were likewise put upon the streets with yellow bodies, black hoods, fenders and tops, in close simulation and imitation of the cabs of the plaintiff.

That the defendant's cabs, as described above, are in general appearance such an imitation and simulation of those used by the plaintiff company as is calculated and likely to mislead and deceive the general public into believing that the cabs of the defendant are the cabs of the plaintiff company, and rendering it improbable that the casual observer would be able to distinguish the cabs of the respective parties; that the cabs of the respective parties, similarly colored and dressed as they are, can be distinguished only by careful comparison and inspection.

That notwithstanding the fact that the defendant operated his two cabs only two days upon the streets of the city of Asheville before the restraining order in this case was issued, it appears that certain intending patrons of the Yellow Cab Company were actually deceived and led to believe that the cabs of the defendant were the cabs of the plaintiff, to the plaintiff's injury and damage.

That while there are numerous points of slight variation and differences in both the details of structural design and shades of color between the cabs of the plaintiff and defendant, these differences are not sufficient to render the respective cabs distinctive from ordinary observation; that the outstanding distinctive features of the yellow color in combination with black on the cabs of both plaintiff and defendant are so similar as to render the differences and variation insignificant and unnoticeable, the general appearance of both being a yellow cab.

As apposite to these averments it is now the generally accepted position that a manufacturer-dealer or proprietor of a business may adopt and use a name, symbol, or device to designate and identify his wares or business, and when by his care, diligence, and the quality of his goods or services he has acquired and established a patronage and good will of substantial value the same will be protected from unfair competition on the part of a rival, and the cases on the subject are to the effect further that it will be considered unfair competition when such rival adopts for his own business, etc., a sign or symbol in such apparent imitation of the former as will likely mislead his customers and the public as to the identity of the goods sold or service rendered. *United Cigar Stores v. United Confectioners*, 92 N. J. Eq., 449 (reported also in 17 A. S. R., p. 779); *Fisher v. Star Company*, 231 N. Y., 414; *Ball v. Bazaar*, 194 N. Y., 429; *Van Horn v. Coogan*, 52 N. J. Eq., p. 380; *George G. Fox v. Glynn*, 191 Mass., 344; *Walker v. Alley*, 13 Grant's Chancery (App. Cases), p. 366; *Dyment v. Lewis*, 144 Iowa, 509; *Herring-Hall-Marvin Safe Company v. Hall's Safe Company*, 208 U. S., 554; *Weinstock, Lubin & Co. v. Marks*, 109 Cal., 529; 38 Cyc., pp. 756-769, 773; Nims on Unfair Competition, pp. 28-60.

In the case of *Van Horn v. Coogan, supra*, it is held: "That one trader has no right to use a name, a mark, letters, or other *indicia* by

which he may induce purchasers to believe that the goods he is selling are the goods of rival trader."

And speaking generally to the position in the citation to Nims, at page 28, the author says: "Courts will sometimes protect trade names or marks, although not registered or properly selected as trademarks, on the broad ground of enforcing justice and protecting one in the fruits of his toil. 'This is bottomed on the principle of common business integrity, and proceeds on the theory that while the primary and common use of a word or phrase may not be exclusively appropriated, there may be a secondary meaning or construction which will belong to the person who has developed it. In this secondary meaning there may be a property right. A reading of the cases cited above shows that three grounds, at least, for this action have been recognized: (1) The promotion of honesty and fair dealings; (2) the protection of the purchasing public against fraud; (3) the protection of the plaintiff's property right.'"

And coming more directly to the question presented in the record, there are well considered decisions from courts of approved ability and learning extending the principle to the case of taxicabs when a rival operator later in the field has attempted to mislead and divert the patrons of a proprietor and the public by a wrongful imitation of such proprietor's cabs used in an established business wherein color was the principal distinguishing feature. *Taxi and Yellow Operating Co. v. Harry Martin,* 91 N. J. Eq., 233; *Yellow Cab Company v. Harry Becker,* 145 Minn., 152; *Carter v. Carter,* 106 Neb., 531; *Knott v. Morgan* (2 Kenn.), p. 213; 48 Eng. Rep., 610; Nims on Unfair Competition, p. 257.

In the *New Jersey case, supra, Taxi and Yellow Operating Co. v. Martin,* the Court said: "It is unfair trade, for which an injunction will issue, for competitors to paint their taxicabs so that by the ordinary patron they are not distinguished from those of complainant which had earned a patronage and good-will under a peculiar and distinctive painting of its cabs, the predominant feature being a conspicuous yellow body. (2) The defendants are barred by their intentional fraud of the plea of common property in color."

And in the *Minnesota case, supra, Cab Company v. Becker:* "A simulation by defendant of plaintiff's taxicabs, used in a public taxicab business will be enjoined *pendente lite* where the imitation is obviously calculated to deceive the public into the belief that the defendant's taxicabs and service are those of the plaintiff, and thereby injure and interfere with its business."

And it may be further observed that while unfairness and fraud is the basis of the action, it is not always required that there should be a malicious purpose to injure, but the question may be determined on the presumption that "every one must be understood to have intended to do

and abide by that which is the natural and probable conduct of his own act deliberately done." On the part of the defendant there are affidavits in denial of much that is alleged by plaintiff, and, in addition, it is presented that defendant, in the use of the yellow cabs, had no design or purpose to divert plaintiff's patronage, but that on carefully looking into the matter, he became convinced, for various reasons given in his supporting affidavits, that yellow was the better color, and that he ascertained further that these yellow cabs were very generally used for hire in all the prominent cities of the United States, so much so that the yellow color had become the distinctive mark of cabs for hire, and for that reason he had adopted and intended to use them in the future. And he contends further that yellow being one of the common colors, may not be appropriated by any one as a proprietary symbol of his trade or business, and numerous authorities are cited in support of this position. An examination of these, however, will disclose that they were principally questions of interference with statutory trademarks, wherein the plaintiff was insisting on the *exclusive* right to the use of a common color, or of a primary name indicative of location or quality of goods, and in which every one, as a general rule, has a right to share, as in *Watch Co. v. Watch Co.*, 179 U. S., 665; *Canal Co. v. Clark*, 80 U. S., 311; *Lawrence v. Mfg. Co.*, 138 U. S., 537; *Goodyear v. Goodyear*, 128 U. S., 598. Or they are cases where on the hearing it was found as a fact that the rival goods had been adequately distinguished, as in *Coats v. Merrick Thread Co.*, 149 U. S., 562; *Blackwell v. Wright*, 73 N. C., 310, a case in which it appears was concerning the validity of a trademark.

In *Tise v. Whitaker*, 144 N. C., 508-510, it is given as the proper deduction from the cases on the subject: "That in an action, the main purpose of which is to obtain a permanent injunction, if the evidence raises a serious question as to the existence of facts which make for plaintiff's right and are sufficient to establish it, a preliminary restraining order should be continued to the hearing."

And considering the record in deference to this recognized principle, and in view of the opposing statements and positions presented, we are of opinion that the restraining order, in the instant case, should be continued to the hearing. As the cause goes back for an ultimate finding on the determinative facts, we do not deem it wise to refer in detail to numerous suggestions made on the evidence in behalf of either of the parties, and will only say that there is assuredly serious question as to a wrongful interference with plaintiff's rights, and that matters should be kept in the position that prevailed when the preliminary order was issued, and as affected by it, until the final hearing. This will be certified that on giving adequate bond the preliminary restraining order be

continued and the case tried on appropriate issues as to the existence of the rights claimed by plaintiff, and on the question whether the defendant in the user of yellow cabs has so distinguished them that plaintiff's patrons and the public generally are not likely to be misled under such observations as ordinarily prevail with the public in selecting this character of service.

Reversed.

B. C. WALKER v. W. P. ODOM, SHERIFF.

(Filed 8 June, 1923.)

1. Actions—Motion in the Original Cause—Independent Actions—Sheriffs—Amercement—Statutes—Courts.

The court may not regard an independent action as a motion in the original cause when the latter is not before it; and where the sheriff is liable for the penalty prescribed by C. S., 3936, for failure to serve a warrant in an action before a justice of the peace, and the plaintiff brings an independent action for the recovery of the penalty before another justice, from whose judgment the defendant has appealed, and a trial *de novo* had in the Superior Court, it is error for the trial judge to regard the summons and complaint in the independent action (C. S., 4396) as a motion in the cause under said section 3936, and proceed with the trial accordingly. The question as to whether the action could be maintained as an independent one under the provisions of C. S., 4396, is not before the Supreme Court on this appeal.

2. Statutes — Penalties — Methods for Enforcement—Sheriffs—Amercement.

The method by which a sheriff may be amerced for unlawfully failing to execute a warrant it was his duty to serve, as prescribed by C. S., 3936, is alone to be followed in an action for the penalty brought thereunder.

APPEAL by defendant from *Shaw, J.*, at November Term, 1922, of CHEROKEE.

Civil action against the sheriff of Cherokee County, tried upon the following issues:

"1. Did the defendant negligently fail to execute the warrant delivered to him by the plaintiff, as alleged in the complaint? Answer: 'Yes.'

"2. What sum, as penalty, is plaintiff entitled to recover? Answer: '$100.'"

Judgment on the verdict in favor of plaintiff. Defendant appealed.

No counsel for plaintiff.

J. D. Malonee and Moody & Moody for defendant.

STACY, J. This was a civil action brought before a justice of the peace against the sheriff of Cherokee County to recover a penalty of $100 for failing and neglecting to serve and to return a warrant, to him lawfully tendered or delivered, and which it was his duty to execute. The case was tried *de novo* on appeal to the Superior Court. The warrant, which it is alleged the defendant negligently failed to execute, was sworn out by the plaintiff before P. E. Nelson, a justice of the peace, for the arrest of one Ernest King. The present suit was instituted by the plaintiff before T. N. Bates, another justice of the peace of Cherokee County.

The only question presented for our decision is whether the plaintiff should have proceeded by a motion in the original cause, as provided by C. S., 3936, or by an independent action, as authorized by C. S., 4396, when there has been a violation of said statute. His Honor held that the defendant was not liable for failing "to return" said warrant under C. S., 4396, but that he was liable for negligently failing "to execute" the same under C. S., 3936. In permitting the plaintiff to proceed under this latter section, the court, in its discretion, treated the summons and complaint as a motion in the original cause. This he would have been authorized to do under our decisions had the original cause reached the Superior Court of Cherokee County. *Craddock v. Brinkley*, 177 N. C., 127; *Jarman v. Saunders*, 64 N. C., 367. But it has been held with us that an independent action may not be treated as a motion in the original cause when brought in another county (*Rosenthal v. Roberson*, 114 N. C., 594); and we apprehend the same ruling should apply in a case like the present, where the original action never reached the Superior Court and the instant suit was started before a different justice of the peace.

A nonsuit having been entered on the cause of action, brought under C. S., 4396, for refusal or neglect to return the warrant, the court was without authority to treat the summons and complaint as a motion in the original cause, wherein the defendant was liable to be amerced for negligently failing to execute said warrant under C. S., 3936, because the original cause of action and the present suit were never in the same court. Jurisdiction cannot be sustained where it requires a jumping from one court to another. The statute not only authorizes an amercement, but it also prescribes the method by which it is to be laid; and the rule of law is that whenever a statute does this no other method of enforcement is to be pursued than the one prescribed. *S. v. Snuggs*, 85 N. C., 542.

The action of his Honor in directing a nonsuit on the cause of action brought under C. S., 4396, for failing "to return" the warrant is not before us for review, as the plaintiff has not appealed.

From the foregoing, it follows that there was error in proceeding further after the nonsuit as above indicated.

Reversed.

T. G. BOYD v. SUNCREST LUMBER COMPANY.

(Filed 8 June, 1923.)

Deeds and Conveyances — Grants—Boundaries—Exceptions—Burden of Proof—Tenants in Common—Title.

In proceedings to partition lands, defendant pleaded sole seizin, and title was made to depend upon the location of the *locus in quo* within the boundaries of a grant from the State, from which was excepted certain lands covered by a senior grant: *Held*, the burden was on plaintiff to show by the preponderance of the evidence the location of land and title thereto, which was shifted to defendant upon his contention that the lands were within the exception to the junior grant, the plaintiff's admission of defendant's interest not affecting the question.

APPEAL by defendant from *Ferguson, J.*, at January Term, 1923, of HAYWOOD.

This was a special proceeding before the clerk of the Superior Court of Haywood to partition 100 acres of land. The plaintiff alleged in his petition that he owned 65/72ds undivided interest in the land, and he admitted that the defendant owned the balance. The defendant, a corporation, filed answer denying that the plaintiff owned any interest in said land, and pleaded sole seizin in itself. Upon the issue of title thus being raised, the clerk transferred the case to civil issue docket.

The case coming on to be tried, the jury found that the plaintiff and defendant were tenants in common of the land, and that the plaintiff owns 65/72ds interest therein and the defendant owns 7/72ds therein. Appeal by defendant.

W. J. Hannah and W. R. Francis for plaintiff.

Merrimon, Adams & Johnston and Morgan & Ward for defendant.

CLARK, C. J. The plaintiff introduced a state grant to John G. Blount, dated 29 November, 1796, for 176,000 acres of land, describing the outside boundary therein, but exempting from the said grant four grants within said boundaries to John Hightower and others containing 3,080 acres, which had been issued to them before the grant to Blount.

The plaintiff then introduced a chain of *mesne* conveyance from Blount to Love, and then the will of Love whereby he devised his "speculation lands (these lands), to be sold and appointed executors with powers

to sell and convey the same. After all the executors were dead, the court appointed R. D. Gilmer trustee and administrator *de bonis non* with the will annexed, who exercised the same power the executors had possessed to sell and convey said land for about twenty years under the order of the court, when he resigned. As to all these proceedings there was no question of illegality or irregularity raised.

When Gilmer resigned as administrator and trustee, the court appointed W. J. Hannah trustee and administrator with the will annexed with the same power as Gilmer had possessed, which he exercised under the orders of the Court until he finally wound up and settled the estate, having sold the remainder of the Love land and conveyed the same to U. J. Sloan. The objection to the last order is presented by the exceptions.

The plaintiff contends that the order appointing W. J. Hannah trustee and administrator fully clothed him with authority, under the orders of the court to the same extent, and that the report of the sale and its confirmation were broad enough to give W. J. Hannah, trustee and administrator, full power to sell all the balance of the Love speculation land whether it had been surveyed and located or not, and therefore the deed from Hannah to Sloan passed title in fee simple to him. If this land was embraced in the exceptions in the grant to John G. Blount, the burden was upon the defendant to prove that its land was in the exception. *McCormick v. Monroe*, 46 N. C., 15; *Gudger v. Hensley*, 82 N. C., 485; *Brown v. Rickard*, 107 N. C., 639 and 645; *Batts v. Batts*, 128 N. C., 21; *Lumber Co. v. Cedar Co.*, 142 N. C., at p. 422.

The plaintiff assumed the burden of showing by the preponderance of the testimony the location of the land and the title thereto, but when the defendant contends that the land in question was a part of the exceptions within the larger grant, the burden was shifted to it. The fact that the plaintiff admits that the defendant is entitled to 7 72ds of the land goes to that extent and no further.

No error.

MAUDE CRAIG, ADMINISTRATRIX, v. THE SUNCREST LUMBER COMPANY ET AL.

(Filed 8 June, 1923.)

Negligence—Evidence—Nonsuit—Employer and Employee—Master and Servant — Railroads—Tramroads—Safe Appliances—Derailments—Statutes.

In an action to recover for the wrongful death of plaintiff's intestate against a tram road or logging road operated by steam, there was evidence tending to show that the intestate, the engineer of the defendant company, was killed by a derailment of his locomotive, an old and antiquated one, that had gotten away from his control and was rapidly

running down grade over a road with many improperly constructed curves; that plaintiff's effort to throw sand upon the track from the sand dome was ineffectual from the failure of the appliance therefor to work; that the cars drawn by the locomotive at the time had only "hand brakes" on them, out of order, etc.: *Held*, upon defendant's motion as of nonsuit, the derailment was in itself evidence of defendant company's actionable negligence, as also the defective appliances and the negligence of the defendant's officers in charge (C. S., 3466, 3467, 3468), these provisions aplying to logging roads and tram roads; and the motion was properly denied.

APPEAL by defendants from *Lane, J.*, at February Term, 1923, of HAYWOOD.

This is an action for wrongful death of plaintiff's husband George Craig, who was an engineer for the Suncrest Lumber Company, and running one of its local trains. He was killed by reason of the engine being derailed and turning over, crushing him to death. The codefendant, C. C. Fry, was superintendent in charge of the operation of the railroad where the intestate was working, and as such was in charge of the railroad engines, cars, and appliances used in connection with the operation of said railroad. The codefendant Hill was section foreman for the company, and was in charge of keeping up the track. The railroad in question was constructed and operated by the defendant company, who also owned a sawmill plant in connection therewith, used for hauling logs to said plant. At the time of the death of George Craig, the train had been taken to the upper end of the track and the cars were loaded with logs. The engineer, Craig, started the engine in the usual way, and after they had gone a short distance of approximately 200 yards, it started to run, and apparently got from under the control of the engineer. The cars attached to the engine had no brakes that could be applied by the engineer, but were intended to be controlled by the "hand brakes." When the train had apparently gotten from under the control of the engineer, both of the brakemen left their posts of duty and jumped, as did the firemen also, leaving the engineer, Craig, as the only member of the train crew who stayed at his post. The grade of the railroad was very steep, and after the train started the engineer was seen to work his lever, which caused sand to go from the sand dome down on the rails for the purpose of checking the speed of the engine and cars. After the eleventh rail, the engineer was unable to get the sand to come down, but was seen to continue attempting to use the sand lever. There was plenty of sand in the sand dome, but for some reason the sand stopped. The engine ran twenty-seven rails after the sand began coming down on the rails before it jumped the tracks and turned over. The track at the point where the engine jumped the rails to the place where

it started to run was very crooked. The rails were not bent so as to make a uniform curve, but the curves were made by means of angles at the points and places where the rails came together. The road bed had never been surfaced or leveled, and the ties had been placed thereon very unevenly. At some places the ends of the ties practically came together at one end, but would be several feet apart at the other end, and the rails were so unevenly laid that first one side of the engine would be elevated and then the other side, causing the engine and train to rock.

The engine which Craig was running when he met his death was what the witnesses term "old flat bottom Climax." The engine was old and worn out when it came to the defendant company. It had a wood body and frame, and the wood, according to the evidence, was worn and rotten. It was further in the evidence that the brakes on the cars could not be tightened while the train was in motion. The brake-beams on the cars and engine were all made of wood, and the brakemen could not put on the brakes without going in between the cars. At the time of the accident, one of the brake-beams on one of the cars was broken and gone so that the brakes could not be applied to the wheels. The brakemen knew the brake-beams on the car were broken and gone, but this fact was unknown to the deceased. The cars were attached to each other and to the engine by the antiquated "pin and link" system, and the engineer had no means of applying the brakes on the cars, but was dependent on the brakemen to apply them by twisting them on by a hand wrench.

Verdict and judgment for the plaintiff. Appeal by the defendants.

Morgan & Ward for plaintiff.
Alley & Alley for defendants.

CLARK, C. J. There are exceptions to the evidence and charge, but they do not require discussion. The real defense is that the court overruled the motion to nonsuit as to the defendant company and Fry, the superintendent, and Hill, the section foreman.

Upon the well settled principle that on a motion for nonsuit the evidence must be taken in the most favorable light for the plaintiff, there was no error in refusing such motion. The road (track, cars, and equipment), upon the evidence, was a most "ramshackle" affair, and the train was unsupplied with the appliances required by law. The road bed was defective and dangerous, and the superintendent and section foreman, the codefendants, were negligent. The derailment itself was evidence of negligence. *Hemphill v. R. R.*, 141 N. C., 487; *Wright v. R. R.*, 127 N. C., 225. By the defective appliances and negligence of the officers the defendant made itself liable, C. S., 3466, 3467, and 3468, and these provisions apply to logging roads and tramroads. C. S., 3470.

No error.

IN RE WILL OF H. W. WOLFE.

(Filed 8 June, 1923.)

1. Wills—Revocation—Presumptions.

A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by any other methods prescribed by law; but the mere fact that a second will was made, although it purports to be the last, does not necessarily create a presumption that it revokes or is inconsistent with one of a prior date.

2. Wills—Interpretation.

In the construction of wills the primary purpose is to ascertain and give effect to the testator's intention as expressed by the words employed, and if the language is free from ambiguity and doubt, and expresses plainly, clearly, and distinctly the maker's intention, there is no occasion to resort to other means of interpretation.

3. Same—"Effects"—Personal Property.

While the word "effects" used in the disposition of personal property by will may include land when used as referring to antecedent words which describes real estate, or when used in written instruments in which the usual technical terms are not controlling, when used in a general or unlimited sense and unaffected by the context, it signifies all that is embraced in the words "personal property," exclusive of real estate.

4. Wills—Intestacy—Presumptions.

The presumption that a testator intended to dispose of all of his estate will not prevail when it is clearly made to appear that he had not included under the written terms of his will certain of his property of which he had died seized and possessed.

5. Same—Revocation.

A testator devised a certain part of his lands to L., and by a later will gave his effects to his brothers and sisters: *Held*, the two wills were not inconsistent, that the later will did not revoke the former, and that he died intestate as to a part of his lands.

APPEAL by proponents from *Brock, J.*, at August Term, 1922, of SURRY.

H. W. Wolfe, the testator, died at the age of 67, leaving personal property of the value of about $4,000, and more than 500 acres of land. He was never married and lived alone; his next of kin were his brothers and sisters. K. F. Luffman had been his miller and tenant for about 16 years, and lived with his family in a house near the mill site, 2 or 3 miles distant from the testator. Lillie Luffman was his daughter, and at the date of the paper offered for probate was about 15 or 16 years of age.

The propounder offered the following instrument for probate: "I, H. W. Wolfe, . . . do make and declare the following to be my last

will and testament: 'Item 1: I will and bequeath to Miss Mary Lillie Luffman a tract of land near Roaring Gap Postoffice, on State Road and Southfork, adjoining the lands of J. M. Royal and others, the land bought by me from H. D. Woodruff, and I will that that land in case of my death go into her possession without any further writing whatever. Witness my hand and seal, this 31 July, 1911.

"H. W. WOLFE. [SEAL.]

"T. W. His (×) Mark LUFFMAN,

"K. F. His (×) Mark LUFFMAN."

The clerk declined to probate it on the ground that another paper-writing, bearing date of 14 August, 1911, had already been probated as the last will and testament of H. W. Wolfe. An appeal was taken to the Superior Court, and at the trial evidence was offered tending to show the due execution of the instrument above set out. The caveators introduced Will Book No. 8, containing the record of the following paper-writing only probated: "I, H. W. Wolfe, . . . do make and declare this to be my last will and testament: Item: I will and bequeath all my effects to my brothers and sisters, to be divided equally among them. Witness my hand and seal, this 14 August, 1911.

"H. W. WOLFE. [SEAL]

"R. W. HARRIS,
"C. L. HARRIS."

The propounder tendered the following issue: "Is the paper-writing offered for probate of date 31 July, 1911, the last will and testament of H. W. Wolfe, or any part of his last will and testament?"

His Honor declined this issue and submitted the following:

"1. Is the paper-writing of date 14 August, 1911, probated and on record in the office of the clerk of the Superior Court of Surry County, Book of Wills No. 8, p. 50, the last will and testament of H. W. Wolfe, deceased?

"2. Is the paper-writing of 31 July, 1911, offered for probate by Lillie Luffman, the last will and testament of H. W. Wolfe, deceased?"

At the close of the evidence the trial judge instructed the jury upon all the evidence to answer the first issue "Yes," and the second "No." Judgment for the respondents. The propounder excepted and appealed.

Folger, Jackson & Folger for propounder.

W. L. Reece, S. Porter Graves, and William Graves for respondents.

ADAMS, J. The presiding judge, we presume, based his peremptory instruction on the legal inference that the earlier paper-writing was revoked by the one of later date, for it is not at all probable that it was his purpose to withdraw from the jury any evidence tending to show the erasure of the original signature to the older instrument. We are therefore called upon to decide whether the instruction given is a necessary deduction from the facts disclosed by the record.

A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by any of the other methods prescribed by law; but the mere fact that a second will was made, although it purports to be the last, does not create a presumption that it revokes or is inconsistent with one of prior date. C. S., 4133 *et seq.;* Gardner on Wills, 266, 271; 1 Redfield on Wills, 350; 1 Jarman on Wills, 186 *et seq.; In re Venable's Will,* 127 N. C., 345; *Fleming v. Fleming,* 63 N. C., 209.

The propounder admits that the instrument dated 14 August (herein for convenience referred to as the second will) is a part of the maker's testamentary disposition, but insists that it does not affect the validity of the instrument dated 31 July, herein designated as the first will. By reason of this admission, the appeal presents the single question whether the two wills are so inconsistent that they cannot stand together, and whether the first is revoked by the second.

It has often been held that in the construction of wills the primary purpose is to ascertain and give effect to the testator's intention as expressed in the words employed, and if the language is free from ambiguity and doubt, and expresses plainly, clearly, and distinctly the maker's intention, there is no occasion to resort to other means of interpretation. Black's Inter-Laws, 37; *Kearney v. Vann,* 154 N. C., 315; *Dicks v. Young,* 181 N. C., 448; *Pilley v. Sullivan,* 182 N. C., 493; *McIver v. McKinney,* 184 N. C., 393; *Ledbetter v. Culberson,* 184 N. C., 488.

In the instant case, the language being clear and unequivocal, the chief controversy between the parties involves the meaning of the words "all my effects" as used in the second will. The propounder contends that they include only personal property; the respondents insist that the term embraces real as well as personal property, and that the second will revokes the first, the two being necessarily inconsistent.

The observation has been made that the individual cases construing "effects" are of value only for the purpose of illustration, each case being a law unto itself; but there seems to be a practical unanimity of judicial decision, with the exception of certain English cases, that the word "effects" used *simpliciter* or in a general or unlimited sense and

unaffected by the context, signifies all that is embraced in the words "personal property," but is not sufficiently comprehensive to include real estate. "Effects," however, may include land when used as referring to antecedent words which describe real estate, or when used in written instruments in which the usual technical terms are not controlling, as in *University v. Miller*, 14 N. C., 188; *Graves v. Howard*, 56 N. C., 302, and *Page v. Foust*, 89 N. C., 447. A discussion of these questions with an exhaustive citation of authorities may be found in the following cases with the subjoined explanatory notes: *Andrews v. Applegate*, 12 L. R. A. (N. S.), 661; *Dickson v. Dickson*, L. R. A., 1918 F. 765; *In re Molson*, 18 Ann. Cas., 279; *Gardner v. McNeal*, Ann. Ca., 1914 A, 119.

In the second will there are no words which *ex vi termini* import a disposition of real property; there is no residuary clause or clause of revocation; and in these circumstances, as the courts do not favor the revocation of wills by implication, there appears to be no sound reason for holding that the two instruments are so inconsistent as to be incapable of standing together, and that the first is necessarily revoked by the second. It is true there is a presumption that the testator intended to dispose of all his estate, and under our construction the testator died intestate as to the land not devised to Mary Lillie Luffman, but as said in *Andrews v. Applegate*, *supra*, such presumption, however strong, will not justify or warrant a construction incorporating in the second will any kind of property which cannot be brought within its terms.

Having admitted that the second will is a valid testamentary disposition of the property therein described, the propounder is entitled to have the jury determine whether the instrument dated 31 July, 1911, is any part of the maker's will. The judgment and verdict are therefore set aside and a new trial is awarded.

New trial.

ORLA ROBERTS v. S. B. ROBERTS.

(Filed 8 June, 1923.)

1. Husband and Wife—Actions—Common Law—Statutes.

The common-law fiction that the entity of the wife merged by marriage in that of her husband, and that neither may sue the other, is a matter of public policy that it is the province of the Legislature to change by statute, for it may declare what acts shall be contrary to or in keeping with the public policy of the State.

2. Same—Torts—Constitutional Law.

Under the provisions of C. S., 408, 454, 2606 *et seq.*, passed in pursuance of Article X, section 6, of our State Constitution, husband and wife are

authorized to contract and deal with their separate property, subject to specific exceptions as if they were unmarried; and by suing alone the wife may recover not only her earnings for personal service, but damages sustained by her in consequence of personal injury or other tort.

3. Same—Willful Torts.

In order for the wife to recover damages for a tort committed by her husband causing her a personal injury, the test of his liability is whether he has committed the breach of a legal duty he owed to her without distinction as to whether the breach was a willful or negligent act.

4. Same—Negligence—Automobiles.

The defendant driving an automobile with his wife and children is liable in tort for his negligent act which causes his wife a personal injury in the wife's action against him, the common-law fiction of a merger of the identity of the wife with that of her husband, and that a recovery may not be had by her in view of their relationship, having been changed by our statutes. C. S., 408, 454, 2606 *et seq.*

APPEAL by defendant from *Bryson, J.*, at March Term, 1923, of MADISON.

The parties are husband and wife. The defendant, in company with his wife (the plaintiff), their children, and others, was driving his car on the road between Marshall and Mars Hill, and while turning a sharp curve caused his car to collide with one driven by Raburn Hensley. The plaintiff was injured by the collision and thereafter brought suit against the defendant to recover damages for the injuries which she sustained. She alleged various acts of negligence on the part of the defendant causing injury to her hand, blood poisoning, the amputation of a finger, and other personal injuries.

The defendant denied the alleged acts of negligence, pleaded the marriage relation in bar of the plaintiff's recovery, and insisted that it is contrary to the laws of this State and against public policy for the plaintiff to sue the defendant while they are living together as husband and wife.

The issues were answered in favor of the plaintiff, and from the judgment rendered the defendant appealed.

Guy V. Roberts and Thomas S. Rollins for plaintiff.
J. Coleman Ramsey and Harkins & Van Winkle for defendant.

ADAMS, J. The appeal presents the sole question whether a wife can maintain an action against her husband to recover damages for personal injury caused by his negligence, that is, by a tort which does not involve an assault or any other kind of willful or intentional wrong. The husband's liability for an assault or other unwarranted and reckless trespass upon the person of his wife has been considered and determined. *Crowell v. Crowell,* 180 N. C., 516.

By the theory of the common law, the legal existence (the individuality) of the wife was suspended during coverture or incorporated into that of the husband—*vir et uxor sunt quasi unita persona, quia caro una et sanguis unus*—and upon this fiction depended most of the rights, duties and liabilities growing out of the marriage relation. Schouler's Dom. Rel., 59. This feigned unity of the persons operated to prevent either spouse from contracting with the other. Upon their marriage the husband acquired the wife's personal property, *jure mariti*, and consequently she could neither give nor contract to give him what he already owned, and he could neither grant anything to her nor enter into a covenant with her, because he could not contract with or execute a grant to himself. Likewise, says Eversley, "Neither husband nor wife could sue each other for personal torts committed by one against the other—such as libel, slander, assault and battery, or injury arising out of negligence; and this was so not only on the ground of the merged existence of the wife and their incapacity to acquire civil rights against each other, but also on account of the unseemly spectacle presented by husband and wife seeking pecuniary compensation from each other for personal wrongs." Dom. Rel., 248. This principle, it may be deduced, has its foundation in regard for the public welfare as well as in the legal fiction of the wife's merged existence. True, in Studies in History and Jurisprudence, 819, Bryce maintained that the wife's position at common law should be regarded as a compromise between the three notions of absorption, of a sort of guardianship, and of a kind of partnership of property, in which the husband's voice nominally prevailed; but this conclusion, if accepted, is not destructive of the common-law doctrine that the nonliability of husband and wife *inter se* in contract and in tort was based not only upon a concept of the unity of the persons, but upon a sound policy which discouraged the transmutation into a cause of action of trivial or unfortunate matrimonial bickering. Reeve's Dom. Rel., 129; 2 Bl. Com., 442; Eversley's Dom. Rel., 167, 291; Schouler's Dom. Rel., 77. And in the absence of a constitutional or statutory provision permitting a husband and his wife to retain their separate legal identity after marriage, the rule still prevails that husband and wife are a legal unity, and therefore incapable of suing each other at law. See citation of authorities in note to *Brown v. Brown;* Ann. Cas., 1915 D, 73; in note to *Thompson v. Thompson,* 14 Ann. Cas., 881, and in *Crowell v. Crowell, supra,* concurring opinion.

It is equally true, however, that the tendency of modern legal thought has been not entirely to displace the common law, but to enlarge the rights of married women even to the extent in some instances of abolishing the common-law fiction. Accordingly, the Legislatures of several states have enacted laws purporting to emancipate married women, the

legal interpretation of each law depending upon its phraseology or particular provisions. These various statutes may be divided into two general classes: those which change and those which do not change the foundation of the marriage status. Under the first, either spouse, in the absence of a restrictive provision, may sue the other in contract or in tort; but under the second it is generally held that such right of action is not conferred. Naturally, there is diversity of opinion as to whether a particular statute supports the one theory or the other, but the reasoning upon which the various decisions *pro* and *con* are based, aptly illustrated by the following authorities, need not further be pursued. *Fiedeer v. Fiedeer,* 140 Pac. (Okla.), 1023; *Brown v. Brown,* 89 At. (Conn.), 889; *Fitzpatrick v. Owens,* Ann. Cas., 1918 C (Ark.), 773; *Prosser v. Prosser,* 102 S. E. (S. C.), 787; *Thompson v. Thompson,* 218 U. S., 611; *Woltman v. Woltman,* 189 N. W. (Minn.), 1022; *Heyman v. Heyman,* 92 S. E. (Ga.), 25; *Dishon v. Dishon,* 219 S. W., 794; *Ex parte Badger,* 226 S. W. (Mo.), 936; *Newton v. Weber,* 196 N. Y. Sup., 113; *Strom v. Strom,* 6 L. R. A., N. S. (Minn.), 191; *Peters v. Peters,* 23 L. R. A., N. S. (Cal.), 699.

We have said that certain rights, duties, and disabilities of husband and wife were produced by the joint operation of public policy and a common-law fiction; and as it is the prerogative of the Legislature to change or modify the common law, and to declare what acts shall be contrary to or in keeping with public policy, it is necessary to determine in what way, if any, and to what extent the relation of husband and wife has been modified in this jurisdiction by legislative enactment.

Pursuant to Article X, section 6, of the Constitution, the Legislature has passed several statutes (to some of which special reference need not be made) defining or prescribing the rights and liabilities of married women. Particularly, it has authorized and empowered them to contract and deal with respect to their real and personal property, subject to specific exceptions, as if they were unmarried, and by suing alone to recover as their sole and separate property not only their earnings for personal service, but damages sustained by them in consequence of personal injury or other tort. C. S., 408, 454, 2506 *et seq.*

By this legislation the relation which married women sustain to their husbands as well as to third parties has been materially affected. The unity of person in the strict common-law sense no longer exists in this jurisdiction, because many of the common-law disabilities have been removed. This change relates to remedies as well as to rights. Following the adoption of the Constitution, the Legislature enacted a statute authorizing a married woman to sue alone when the action is between herself and her husband; and this statute has been construed to confer upon the wife the right to maintain an action against her husband.

Battle's Rev., 154; C. S., 454; *Shuler v. Millsaps*, 71 N. C., 297; *McCormac v. Wiggins*, 84 N. C., 279; *Manning v. Manning*, 79 N. C., 293; *Robinson v. Robinson*, 123 N. C., 137; *Perkins v. Brinkley*, 133 N. C., 158; *Graves v. Howard*, 159 N. C., 594.

While this construction of the statute has frequently been applied to enforce contracts and to determine proprietary rights between husband and wife (the conspicuous exception being *Dorsett v. Dorsett*, 183 N. C., 354), the question of its application to actions *ex delicto* was finally determined in *Crowell v. Crowell, supra*. There it was held by a divided Court, it is true, that the act of 1913 (C. S., 2513), conferred upon the wife a cause of action against her husband for the secret communication of a disease which impaired her health. Although it is said in the concurring opinion that the wife should not be denied an action against her husband for a willful or wanton injury, the opinion of the Court purports to be founded upon basic principles in the law of torts, the application of which to the marriage relation—not nice or refined distinctions between a willful and a negligent tort—produced a marked divergence in the expression of individual opinions. The truth is, that upon the question of the defendant's liability the Court properly made no apparent effort to distinguish a willful from a negligent injury to the person, for with certain cases specifically excepted, the rule is that liability in tort is not dependent on the element of wantonness or malice. An act may be involuntary, intentional, or negligent. Indeed, it may be said that neither the theory of culpability nor that of absolute responsibility is exclusively true, and that the ultimate test of liability is the breach of a legal duty which the defendant owes to the plaintiff. Hale on Torts, secs. 13-24; 1 Jaggerd on Torts, 48 *et seq.*; 7 Harv. Law Rev., 455; *Robinson v. Threadgill*, 35 N. C., 40; *Bond v. Hilton*, 44 N. C., 308; *Solomon v. Bates*, 118 N. C., 311; *Fisher v. Greensboro*, 128 N. C., 375.

We conclude, therefore, that the plaintiff may maintain her action without regard to the question whether her injuries were the result of the defendant's negligent or willful wrong, that his Honor properly declined to give the defendant's requested instructions, and that there is no reversible error in the record.

No error.

W. R. WILSON v. BLACKWOOD LUMBER COMPANY.

(Filed 8 June, 1923.)

1. Employer and Employee—Master and Servant—Negligence—Assumption of Risks.

An employee only assumes the ordinary risks incident to his employment, and not those due to his employer's negligence, unless they are so obvious that a man of ordinary prudence would not have continued to work on and incur the attendant risks, a principle equivalent to that of contributory negligence, involving the element of proximate cause.

2. Same—Evidence—Nonsuit.

Upon evidence tending to show that an employee expressed his unwillingness to attempt with insufficient help to move a heavy piece of green timber, and was injured in so doing under the order of the defendant's subforeman without additional help, the employee is not held to have assumed the risk of the negligent act of the subforeman, and defendant's motion as of nonsuit upon the evidence was properly denied.

APPEAL by defendant from *Lane, J.*, at February Term, 1923, of JACKSON.

On 14 April, 1921, the plaintiff was an employee of the defendant and subject to the orders of one Williams, who was the subforeman. Williams directed the plaintiff and two others to get log-hooks and move certain pieces of green timber. The plaintiff told him the timber was too heavy for four men to move, and asked for other help. Two of the men went to the rear end of a log, which was about 20 feet long, and Williams and the plaintiff went to the other end. Williams gave orders to lift the timber, and in attempting to carry it the plaintiff strained his back and was injured. The plaintiff alleged that the defendant was negligent in failing to provide sufficient help, proper means and appliances, and a safe place in which to work.

The plaintiff testified, among other things, that he thought the timber was too heavy for four men, but not that it was dangerous to undertake to carry it; that he told the foreman it was too heavy, but in trying to carry it he was obeying instructions; that the foreman commanded him to assist the others. There was evidence in contradiction and in corroboration, and the issues of negligence, assumption of risk, and damages were answered in favor of the plaintiff. Judgment; appeal by the defendant.

Sutton & Stillwell for plaintiff.
Alley & Alley for defendant.

ADAMS, J. The exception is addressed to his Honor's refusal to dismiss the action as in case of nonsuit. Admitting the duty of exercising

ordinary care to provide proper assistance and a reasonably safe and suitable place for work, the defendant contends that according to the plaintiff's own testimony he assumed the risk of injury, and is not entitled to damages. In this jurisdiction it is held that while an employee assumes all the ordinary risks incident to his employment, he does not assume those which are due to his employer's negligence, unless they are so obvious that a man of ordinary prudence would not continue to work on and incur the attendant risks; and further, that this is equivalent to referring the question of the assumption of risk to the principles of contributory negligence. *Sims v. Lindsay*, 122 N. C., 678; *Lloyd v. Hanes*, 126 N. C., 359; *Coley v. R. R.*, 129 N. C., 407; *Marks v. Cotton Mills*, 135 N. C., 287; *Pigford v. R. R.*, 160 N. C., 95; *Brown v. Foundry Co.*, 170 N. C., 39.

In *Pigford's case, supra*, the plaintiff requested additional help, and his superior officer said, "Go and try; do the best you can; it is the engineer's orders"; and it was held, "When a servant is injured within the scope of a dangerous employment by the negligent act of the master in not furnishing him sufficient and competent assistance, and the master's negligence is the proximate cause of the injury, the servant is not held to have assumed the risk of the master's negligent act, and can recover unless his own negligence contributed to the injury as the proximate cause."

While the plaintiff's evidence may not be entirely consistent, we are not prepared to hold as a matter of law that the second issue should have been answered for the defendant, or that the action should have been dismissed. We think his Honor properly left the controversy to the determination of the jury.

We find no error which entitles the defendant to a new trial.

No error.

J. H. HARRIS, ON BEHALF OF HIMSELF AND ALL OTHER TAXPAYERS OF THE CITY OF DURHAM WHO MAY DESIRE TO JOIN WITH HIM, v. CITY OF DURHAM, ITS MAYOR AND ALDERMEN.

(Filed 8 June, 1923.)

Municipal Corporations—Charter—Sales—Public Purposes—Ordinance.

Where a city owns a building used for public purposes and an adjoining lot, it may sell same under the provisions in its charter allowing a sale, either publicly or privately, of public places and buildings under an ordinance passed by a recorded affirmative vote of at least seven of the members elected to the council.

HARRIS *v.* DURHAM.

APPEAL by plaintiffs from *Bond, J.*, at May Term, 1923, of DURHAM.

This was a civil action of the plaintiff on behalf of himself and all other taxpayers of the city of Durham against the city of Durham, its mayor and aldermen, to restrain and enjoin the defendants from selling for a sum not less than $250,000 all that certain lot of land in the city of Durham, bounded on the east by Corcoran Street, on the north by Chapel Hill Street, on the west by Market Street, and on the south by Parrish Street, and the lands of the Durham Loan and Trust Company.

By agreement of counsel, his Honor, Judge Bond, found the following facts:

That heretofore, to wit, in 1901, the defendant, the city of Durham, acquired by fee-simple deed, without restriction or reservation, a tract of land in the city of Durham, and thereafter sold a part of this land to the United States Government for a postoffice site, and on a part of the remainder erected a building to be used at that time as a city market and auditorium, and containing also a small number of rooms to be used by city officials, the remainder of the lot being that portion not covered by the building, was used for several years as a hitching lot. Later the building was partially destroyed by fire, and from the insurance collected a new and modern market was erected on a lot purchased elsewhere for that purpose; the original building was reconstructed into a city auditorium, which is now leased by the city for the purpose of a theater and moving-picture house, the city retaining a few rooms, which have been used as offices for the city officials.

The use of the vacant lot as a hitching lot was condemned by the health authorities of the city, and in 1916, at the request of certain citizens of the city, it was determined to beautify said lot and change its unsightly condition, and the then governing body passed a resolution to the effect that it be laid out as a park, and a band-stand erected thereon.

Owing to the continual growth and expansion of the city, and its business affairs, including the acquiescence of a municipally owned water plant, the offices originally arranged for the city officials having been outgrown, and are now entirely inadequate to house the officials and properly take care of the business of the city, and as a result the city is now, and has been for some time, paying rent for offices for a part of its forces. Also, owing to the growth of the city, the school facilities, and especially the high school facilities, of the city, are crowded and inadequate for the school children, and the school board of the city desires an extension of the high school building by an addition of a wing thereto, and containing some eighteen or more schoolrooms, so as to relieve the present crowded condition of the high school and to provide for the yearly increase of high school students.

The city authorities, through a committee of their body, have made a thorough investigation of the situation, and are of the opinion that the old municipal building and the lot adjacent can be disposed of for a sum of approximately $250,000, sufficient to purchase another building in the city and to renovate it and to so change it as to adequately accommodate not only all the offices and departments of the city government at present occupying the old municipal building, but also all other departments of the city which are now occupying rented quarters, and also to accommodate various other activities of the city such as affording an armory for the military company, rooms for the boy scouts, meeting rooms for the assembly of citizen, the American Legion, and such like, including a large and commodious auditorium which can be leased as a theater or academy of music, as is done in the old building. In addition to the amount to be expended in the acquisition and reconstruction of the building referred to, there will be derived from the sum received from the sale of the old building, a sufficient amount to make the addition to the high school building desired by the school board, and to beautify the grounds of the high school, which grounds consist of about fifteen acres of land, the contemplated improvement of which consists of playgrounds, walkways, baseball park, and other attractive features, all of which total a large improvement to the actual facilities and attractions of the city.

In addition to securing a modern municipal building, a much needed addition to its schools and playgrounds for its school children, the city will benefit by a large saving in rents which it is now compelled to pay, by a large amount of taxes which will be collected from improvements which may be made upon the site which the old municipal building now occupies, and from a large increase in efficiency in the handling and conduct of the city's business affairs.

Upon the evidence offered and duly considered, I find that there has never been a dedication of the vacant lot of land lying west of the old municipal building as a public park, there being no intention at the time the city beautified said park to so dedicate or set same aside as a park indefinitely, for the reason that at that time, and several times since then, the city has contemplated using the said vacant lot for other purposes.

I find further that it will be greatly to the advantage of the city to dispose of its present holdings referred to in the complaint and answer, and to convert same into other holdings, as set forth in the answer, and in these findings of fact, and that such disposal and conversion will work greatly to the benefit of the city of Durham, its citizens and taxpayers.

I find further that the city has the authority and power to sell or dispose of said lot and to so invest the proceeds derived from said sale, such power being specially conferred by section 1, section 32, and section 48 of its charter, to wit, Private Laws 1921, ch. 142.

Upon the facts found by his Honor, he dismissed the prayer of the plaintiff for a restraining order, refused to enjoin the defendants, and authorized the defendants to proceed with the proposed sale of the property in question in conformity with the provisions of its charter. From this judgment the plaintiffs appealed, assigning error.

W. J. Brogden, J. L. Morehead, and W. L. Foushee for plaintiffs.
S. C. Chambers for defendants.

CLARKSON, J., after stating the case: The only legal question presented by the appeal is the power of the city of Durham to sell property owned by the city and used for governmental purposes and a vacant lot. Briefly summing up the facts as found by the learned judge who tried this case: It is the intention of the city of Durham to sell certain municipally owned property, consisting of the old Municipal Building, in which are located certain offices of the city government, and the adjoining lot, and with the funds derived from such sale to:

(a) Secure a new building and to renovate this building for use as a municipal building, which will take care of and accommodate all the offices and departments of the city government, furnish an auditorium, afford an armory for the military company, rooms for the American Legion and Boy Scouts, and other useful purposes.

(b) To get a sufficient sum to make an addition to the high school building—to beautify the high school grounds, which consist of about fifteen acres of land—the contemplated improvement consisting of playgrounds, walkways, baseball park, and other attractive features.

The intention of the governing body of the city, and those in authority elected by the people, is to have modern, up-to-date conveniences for its governmental agencies, and to improve the high school and carry out other laudable civic improvements for the social well-being of the community—a forward-looking, constructive program for the uplift and betterment of the city and its inhabitants.

It appears from the facts found in this case that the governing body will have funds sufficient from the sale of the old Municipal Building and the adjacent lot to do all these things. Can this sale be legally consummated and the purchaser acquire a good title in fee simple is the sole question presented in this case.

C. S., 2688. *"Public sale by mayor and commissioners.* The mayor and commissioners of any town shall have power at all times to sell at public outcry, after 30 days notice, to the highest bidder, any property, real or personal, belonging to any such town, and apply the proceeds as they may think best."

The above general law was in existence when the Legislature of 1921 (see Private Laws, ch. 142) granted practically a new charter to the city

of Durham. This new act is comprehensive, and seems to be a modern constructive charter to meet the new conditions of a thriving and prosperous city.

Section 1 of said charter is as follows: "That the inhabitants of the city of Durham shall be and continue as they have been a body politic and corporate, and henceforth the corporation shall continue to bear the name and style of the 'city of Durham,' and under such name and style is hereby vested with all the property and rights of property which now belong to the corporation, and by this name may acquire and hold for the purpose of its government, welfare, and improvement, all such estate as may be devised, bequeathed, conveyed to, or otherwise acquired by it, and may from time to time sell, dispose of, and invest the same, as shall be deemed advisable by the proper authorities of the corporation, and as shall be in conformity with the provisions of this charter."

Section 32. "The rights of the city of Durham in and to its streets, avenues, parks, bridges, cemeteries, markets, and other public places and buildings, and its waterworks, shall not be sold except by an ordinance passed by a recorded affirmative vote of at least seven of the members elected to the council, and under such other restrictions as may be imposed by law."

Section 48. "Among the powers hereby conferred upon the city, all of which the city council shall be authorized to exercise unless otherwise provided by this charter, are the following: . . . To acquire by purchase or condemnation, lay out, establish, and regulate parks and public playgrounds within or without the corporate limits of the city for the use of the inhabitants thereof. . . . To sell and cause to be sold publicly or privately any property, real or personal, belonging to the city, and all of its rights, title, and interest in and to all land used for street or other public purposes, but such sale shall be made in conformity with the provisions elsewhere set forth in this chapter."

The record in the case shows that all the requirements of the charter that provides for the sale of "other public places and buildings" have been fully complied with.

The charter of the city of Durham is a special act. The provisions of the charter in the sections before mentioned confer full power and authority to sell the property in question and make title in fee simple. The sale under the express provisions of the charter can be made either publicly or privately by complying with the provisions of the charter requiring "an ordinance passed by a recorded affirmative vote of at least seven of the members elected to the council." *Allen v. Reidsville,* 178 N. C., 513. The charter of the city of Durham has amply protected its taxpayers by providing that the property contemplated to be sold could not be done "except by an ordinance passed by a recorded affirmative vote of at least seven of the members elected to the council." These men

are elected by the taxpayers and legal voters of the city of Durham. There seems to be a strong tendency on the part of the legislative branch of the Government to give all municipal corporations large powers for educational and social betterment. These powers should be used with caution for the common good, without extravagance or waste, but with economy and care. The governing body of the city of Durham seems to be carrying out this general policy, and, under its charter and law, it has a right to do so.

On all the facts, his Honor was correct in dismissing the prayer of the plaintiffs for a restraining order, and refusing to enjoin the defendants.

Affirmed.

MILDRED SMALL, BY HER NEXT FRIEND, W. L. BALTHIS, v. JOHN R. MORRISON, THE GLOBE INDEMNITY COMPANY, AND J. C. SMALL.

(Filed 8 June, 1923.)

1. Contracts — Policies—Indemnity—Actions—Beneficiaries—Conditions Precedent.

The principles upon which the beneficiaries of an indemnity policy may recover against the insurance company cannot have effect against the express terms of the policy, requiring as a condition precedent that no action thereon may be maintained by the beneficiary "unless and until execution against the assured is returned unsatisfied" in an action brought against him; and when the alleged cause of action cannot be maintained against the assured, none can be maintained against the indemnity company that issued the policy.

2. Parent and Child—Domestic Relations—Personal Injury—Actions—Torts—Public Policy.

It is against the policy of the law in the furtherance of domestic peace and happiness, to permit an unemancipated minor child living at the home of her father as a member of his family, to maintain an action against him for his tort, for a personal injury she has received, alleged to have been caused by his negligence in running an automobile in which she was riding at the time, the welfare of the child being looked after by the courts and by statute especially enacted for the purpose in certain instances, but without statute permitting a recovery of this character, as in case of a wife in her action against her husband.

HOKE, J., concurring; CLARK, C. J., dissenting; CLARKSON, J., not sitting or taking part.

APPEAL by plaintiff from *Long, J.*, at March Term, 1923, of GASTON.

Civil action on behalf of the infant plaintiff, brought by her next friend, to recover damages of her father, J. C. Small, the Globe Indemnity Company, and John R. Morrison for an alleged negligent injury caused by the collision of two automobiles, one driven by plaintiff's

father and the other by John R. Morrison. The defendants J. C. Small and the Globe Indemnity Company each demurred to the complaint. Demurrers sustained, and the plaintiff appealed. The defendant John R. Morrison filed answer denying liability, and does not appeal, as the case against him has not yet been tried.

Mangum & Denny for plaintiff.
Clarkson, Taliaferro & Clarkson for defendant Small.
C. W. Tillett, Jr., for defendant Globe Indemnity Company.

STACY, J. Mildred Small, 9-year-old daughter of J. C. Small, brings this action against her father, the Globe Indemnity Company, and John R. Morrison to recover damages for an alleged negligent injury caused by the collision of two automobiles, one owned and driven by the defendant J. C. Small, with whom plaintiff was riding at the time, and the other owned and driven by the defendant John R. Morrison. It is alleged that plaintiff's injuries were caused by the negligence of each or both of the individual defendants. The Globe Indemnity Company is joined as a party defendant because it is alleged that J. C. Small, plaintiff's father, carried a policy of liability insurance with said company, wherein it agreed "to indemnify the assured against loss from the liability imposed by law upon the assured for damages as a result of the ownership, maintenance, or use of any of the said automobiles"; with a provision that the total liability of the company under the policy should not exceed $5,000 for injury to any one person.

J. C. Small and the Globe Indemnity Company demur to the complaint for the following reasons: (1) Because plaintiff, the unemancipated minor child of defendant J. C. Small, cannot maintain this action against her father; and (2) because there is a misjoinder, both of parties defendant and of causes of action—the one sounding in tort and the other arising *ex contractu*, according to the allegations of the complaint. *Shore v. Holt, ante,* 312, and cases there cited. (3) The Indemnity Company further demurs because it is provided that no claim on the part of the plaintiff can arise under the policy in question until execution against the defendant J. C. Small shall have been returned unsatisfied in an action brought against him. For this position, the defendant relies upon the cases of *Newton v. Seeley,* 177 N. C., 528; *Clark v. Bonsal,* 157 N. C., 270, and *Hensley v. Furniture Co.,* 164 N. C., 148.

The principle announced in *Gorrell v. Water Supply Co.,* 124 N. C., 328; *Fisher v. Water Co.,* 128 N. C., 375; *Jones v. Water Co.,* 135 N. C., 544, and *Morton v. Water Co.,* 168 N. C., 582, to the effect that, in certain cases, a beneficiary under a contract, though not a formal party thereto, may maintain an action for its breach, can have no application

to the facts of the present record; for here, by express stipulation, the indemnitor is not to be held liable in an action at the instance of the injured party, unless and until "execution against the assured is returned unsatisfied" in an action brought against him. This, in terms, is made a condition precedent to the right of the injured party to maintain an action against the indemnity company; and where the rights of the parties are fixed by contract, the law will uphold such rights. *Clancy v. Overman,* 18 N. C., 402; *Clark v. Bonsal, supra,* and cases there cited. The assured could have applied for, and no doubt obtained, a policy of insurance which would have given the instant plaintiff a right to maintain an action against the indemnity company, without first suing the assured, but this was not done, and we are not at liberty to add such a provision to the present contract. The question of liability must be determined according to the rights and duties of the parties at the time of the injury.

The right of the plaintiff to proceed against the Indemnity Company must of necessity rest upon her right to sue her father in tort; and, if this be denied, the judgment sustaining the demurrer should be affirmed. Holding, as we do, that such remedy is not available to the instant plaintiff in an action like the present, we deem it unnecessary to consider the other grounds urged in support of the demurrers.

While this position is supported by all the authorities on the subject, with none to the contrary, it is worthy of note that in the entire judicial history of this country and of England not more than four or five cases involving the question have found their way to any of the appellate courts. This within itself would seem to be a circumstance tending to show not only the soundness of the position, but also that it is founded in natural justice and in keeping with the eternal fitness of things; otherwise a number of cases might have been expected, some involving the most trivial and others the most serious allegations of negligence. To entertain the present suit, would be to open the doors of the courts to every minor child who has suffered an injury, real or imaginary, at the hands of its parents on account of their neglect, or want of due care, in providing for or looking after its welfare. This, to say the least, would be unseemly if not productive of great mischief.

The principal reasons assigned for denying to minor children the right to sue their parents in tort are clearly stated in 20 R. C. L., 631, as follows: "It is well established that a minor child cannot sue his parent for a tort. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. An unkind and cruel

parent may and should be punished at the time of the offense, if an offender at all, by forfeiting custody and suffering criminal penalties, if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit, when arrived at majority, free from parental control and under counter influences, against his own parent, either for services accruing during infancy or to recover damages for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. And this rule has been applied not only in cases of excessive punishment, or other assault and battery, but to the most extreme case possible, that of the ravishment of a minor daughter by her father."

Again, in 29 Cyc., 1663, it is said: "Actions by children against their parents are not to be encouraged unless to redress clear and palpable injustice, and a minor child has no right of action against a parent for the tort of the latter."

Apparently the earliest reported case in this country involving the question under consideration is *Hewlett v. George*, 68 Miss., 703; 9 So., 885; 13 L. R. A., 682 (1891). Here a minor daughter, who had been married, but who at the time of the alleged injury was separated and living apart from her husband, brought suit against her mother for wrongfully confining her in an insane asylum. The Court, remarking that there was not sufficient evidence to show that she had not resumed her former place in her mother's home, and was therefore unemancipated, held as follows: "If, by her marriage, the relation of parent and child had been finally dissolved, in so far as that relationship imposed the duty upon the parent to protect and care for and control, and the child to aid and comfort and obey, then it may be the child could successfully maintain an action against the parent for personal injuries. But, so long as the parent is under obligation to care for, guide, and control, and the child is under reciprocal obligation to aid and comfort and obey, no such action as this can be maintained. The peace of society, and of the families composing society, and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent. The state, through its criminal laws, will give the minor child protection from parental violence and wrong-doing, and this is all the child can be heard to demand."

The next case is *McKelvey v. McKelvey*, 111 Tenn., 388; 77 S. W., 664; 1 Ann. Cas., 130 (1902). This was a suit instituted by a minor against her father and stepmother, seeking to recover damages for cruel and inhuman treatment alleged to have been inflicted upon her by the stepmother at the instance and with the consent of the father. The suit

was dismissed upon demurrer, and the Supreme Court upheld the judgment of dismissal. The case of *Hewlett v. George, supra,* was approved and quoted from at length. The following is taken from the opinion: "So far as we can discover, this rule of the common law has never been questioned in any of the courts of this country, and certainly no such action as the present has been maintained in these courts. It is true that no less celebrated an authority than *Judge Cooley,* in the second edition of his work on Torts, at page 171, observes that 'in principle there seems to be no reason it should not be sustained. No case, however, is cited in support of this text. In fact, the only case which the diligence of counsel has been able to find in which this particular question has been discussed is that of *Hewlett v. George,* reported in 68 Miss., 703; 9 So. Rep., 885; 13 L. R. A., 682."

The next case in point of time (1905) is *Roller v. Roller,* 37 Wash., 242; 79 Pac., 788; 68 L. R. A., 893. In this case the defendant had been convicted of a very serious and aggravated assault upon his minor daughter, and she brought suit to recover of him damages therefor. Defendant demurred to the complaint, and the case went up on the judgment overruling the demurrer, which judgment was reversed in the appellate court on the ground that a minor child has no cause of action against her father for tort committed.

In the course of its opinion the Court said: "The rule of law prohibiting suits between parent and child is based upon the interest that society has in preserving harmony in the domestic relations, an interest which has been manifested since the earliest organization of civilized government, an interest inspired by the universally recognized fact that the maintenance of harmonious and proper family relations is conducive to good citizenship, and therefore works to the welfare of the State.

"This view, in effect, is not disputed by the respondent, who admits the general proposition that the domestic relations of the home and family fireside cannot be disturbed by the members thereof, by litigation prosecuted against each other for injuries, real or imaginary, arising out of these relations; but he asserts that the law has well-defined limitations, and that every rule of law is founded upon some good reason, and the object and purpose intended to be attained must be looked to, as a fair test of its scope and limitations; that, in the case at bar, the family relations have already been disturbed, and that, by action of the father, the minor child has, in reality, been emancipated; that the harmonious relations existing have been disturbed in so rude a manner that they never can be again adjusted; and that, therefore, the reason for the rule does not apply.

"There seems to be some reason in this argument, but it overlooks the fact that courts, in determining their jurisdiction, or want of jurisdic-

tion, rely upon certain uniform principles of law, and, if it be once established that a child has a right to sue a parent for a tort, there is no practical line of demarkation which can be drawn; for the same principle which would allow the action in the case of a heinous crime, like the one involved in this case, would allow an action to be brought for any other tort. The principle permitting the action would be the same. The torts would be different only in degree. Hence, all the disturbing confusion would be introduced which can be imagined under a system which would allow parents and children to be involved in litigation of this kind.

"Outside of these reasons, which affect public policy, another reason, which seems almost to be *reductio ad absurdum*, is that, if a child should recover a judgment from a parent, in the event of its death the parent would become heir to the very property which had been wrested by the law from him. In addition to this, the public has an interest in the financial welfare of other minor members of the family, and it would not be the policy of the law to allow the estate, which is to be looked to for the support of all the minor children, to be appropriated by any particular one.

"At common law it is well established that a minor child cannot sue a parent for a tort. It is said by Cooley on Torts, p. 276, under the title of 'Wrongs to a Child': 'For an injury suffered by the child in that relation no action will lie at the common law.' And this has been held to be analogous to coverture, where a husband or wife is forbidden to sue the other spouse for torts or wrongs committed upon them to their damage during coverture, even refusing the action after the relation, by a divorce, has ceased to exist. See *Abbott v. Abbott*, 67 Me., 304; 24 Am. Rep., 27, which is simply an expression of the universal law on that subject. See, also, *Bandfield v. Bandfield*, 117 Mich., 80; 75 N. W., 287; 72 Am. St., 550; 40 L. R. A., 757.

"Mr. Schouler, in his work on Domestic Relations, sec. 275, after discussing the proposition of filial relations, says: 'With reference to a blood parent, however, all such litigation seems abhorrent to the idea of family discipline which all nations, rude or civilized, have so steadily inculcated, and the privacy and mutual confidence which should obtain in the household. An unkind and cruel parent may and should be punished at the time of the offense, if an offender at all, by forfeiting custody and suffering criminal penalties, if need be; but for the minor child who continues, it may be for long years, at home and unemancipated, to bring a suit, when arrived at majority, free from parental control and under counter influences, against his own parent, either for services accruing during infancy or to recover damages, for some stale injury, real or imagined, referable to that period, appears quite contrary to good policy. The courts should discourage such litigation. . . .'

"This text goes beyond the circumstances of the case at bar, where the action was brought during the minority of the plaintiff. As will be seen by the extract above quoted, it is even forbidden after the child becomes of age, if the injury sued upon is referable to the period of minority. So well is this principle of the law understood that there have been very few attempts to inaugurate actions of this kind. The only one to which we are referred by brief of counsel, or which we have been able by independent investigation to discover, which seems to be in point, is *Hewlett v. George,* 68 Miss., 703; 9 South., 885; 13 L. R. A., 682, where it was held that a parent is not civilly liable to a child for personal injuries, inflicted during minority, and where the relation of parent and child with its mutual obligations exist."

The last reported case upon the subject seems to be *Taubert v. Taubert,* 103 Minn., 247; 114 N. W., 763 (1908), which was presented upon the following facts:

Plaintiff's father died leaving a tanning and fur-dyeing business which the mother of the 17-year-old plaintiff was carrying on as administratrix of the estate of her deceased husband. The plant was under the active superintendency of Paul Taubert, an adult and older brother of the plaintiff, and plaintiff was injured while working as an employee at the plant and assigned the negligence of his brother, the superintendent, as the cause of such injury. The case is analogous to the present one in that the mother carried a policy of liability insurance and the insurance company joined in the defense of the suit, though not as a formal party defendant. There was a verdict for the plaintiff, and on appeal to the Supreme Court, judgment of the lower court was set aside upon the ground that a minor, unemancipated, could not sue his parent in an action based on tort.

The following is taken from the opinion of the Court: "The general rule is that a minor cannot sue his parent for a tort; but, if he has been emancipated, he can. A mere waiver, however, by the parent of the right to the earnings of his minor child does not alone constitute such emancipation. There must be a surrender by the parent of the right to the services of his minor child, and also the right to the custody and control of his person. 1 Jaggard, Torts, 462; 1 Cooley, Torts (3 ed.), 493. The disability of a minor to maintain an action for tort against his parent arises from the family relation, which may exist intact, although a minor may have been given the right to receive as his own his wages; hence, to take a case out of the general rule, there must be not only a waiver of the minor's services, but a surrender of parental control over him. The trial court correctly charged the jury as to this question of the plaintiff's emancipation. It is, however, earnestly contended on behalf of the defendant that the evidence shows that the emancipation

of the plaintiff was limited to plaintiff's wages, and that other than this there was no change in the parental relation. The evidence is amply sufficient to sustain a finding that the mother waived her right to the plaintiff's wages, and that she employed him to work for her in the factory for the stipulated compensation of $6 a week and his board and lodging in her home. But on the question whether she freed him from her parental custody and control the evidence is not entirely satisfactory, but sufficient, nevertheless, to justify the submission of the question to the jury."

The argument in favor of sustaining a recovery in cases like the present seems to be that, on principle, there is no reason why the parent should not be subject to a civil responsibility similar to that of a guardian or teacher, who, though standing *in loco parentis*, is liable for excessive punishment. Cooley on Torts (2 ed.), 198. We think this argument, however, is more than overcome by practical considerations of public policy, which discourage causes of actions that tend to destroy parental authority and to undermine the security of the home. No greater disservice could be rendered to any child than to teach its feet to stray from the path of rectitude, or to suffer its mind to be poisoned by ideas of disloyalty and dishonor. The policy heretofore established in this State with respect to the maintenance of the family as the social unit is diametrically opposed to the communistic theory which Russia has unsuccessfully sought to put into practice. From the very beginning the family in its integrity has been the foundation of American institutions, and we are not now disposed to depart from this basic principle. Freedom in this country is the self-enforcement of self-enacted laws; and liberty with us is the right to go and do as you please under the law, or so long as you please to do right. Hence, in a democracy or a polity like ours, the government of a well ordered home is one of the surest bulwarks against the forces that make for social disorder and civic decay. It is the very cradle of civilization, with the future welfare of the commonwealth dependent, in a large measure, upon the efficacy and success of its administration. Under these conditions, the State will not and should not permit the management of the home to be destroyed by the individual members thereof, unless and until the interests of society itself are threatened. Whenever this occurs, adequate provision for the protection of the community, as well as the members of the family involved, has been supplied in the form of juvenile courts, welfare officers, etc. To say that a minor child, while living in the household of its parents, must be given the right to sue the latter for a tort committed, or else be declared an "outlaw," is simply begging the question and overlooking entirely the consequences that such a proceeding would have upon the household of which said child is an important member and component part. In this society of ours, complex as it is,

all rights are relative; and the courts, as well as the Legislature, must look to the larger good and not merely to the smaller hope. They are not to be "penny wise and pound foolish." It is conceded that the case at bar must be decided on general principles, as there is no enactment of the General Assembly covering the subject; and it is further conceded that we have not yet adopted the destructive theory of communism as a governmental policy in this country.

In *Roller v. Roller, supra,* the Washington Court seems to have considered all the arguments in support of, as well as those against, the doctrine announced in the several cases. To permit a minor child to sue its father for a tortious wrong would be to allow the child to take from its parent that which is already dedicated to its support and maintenance; because the law says that a parent must provide, according to his means, for the support, care, and maintenance of his minor children. It would also allow one minor child to gain an advantage over his minor brothers and sisters at the expense of the common fund which has been dedicated to a fair and equal support of them all. And further, even taking the plaintiff's view, a suit would do no more than award to the injured child that which the simple dictates of family life have already impressed with a trust in its favor. In this respect, it is permissible to observe that generosity is not a stranger to a willing hand, but it is to a forced one.

There are some things that are worth more than money. One of these is the peace of the fireside and the contentment of the home; for of such is the kingdom of righteousness. While the family relation of parent and child exists, with its reciprocal rights and obligations, the latter should not be taught "to bite the hand that feeds it," and no such action as the present should be entertained by the courts. As the twig is bent, the tree will incline; and it is the inexorable law of nature that whatsoever a man soweth, that shall he also reap. Grapes are not gathered from the thorn-bush, nor figs from the thistle. It is doubtful if any age promises a sweeter remembrance than that of a happy childhood, spent in the lovelight of kindly smiles and in the radiance of parental devotion. "Honor thy father and thy mother that thy days may be long upon the land which the Lord thy God giveth thee" is an injunction from on high, and it contains as much truth today as it did under the Mosaic dispensation. Verily, it is a command of Holy Writ—good for all time. In youth the currents of life are prodigal in their racing course, and we shoud be slow to encourage or to permit a minor, in the household of its parents, unemancipated, and who has not yet arrived at the age of discretion, acting only upon the advice of a "next friend," to run the risk of losing a priceless birthright and a rich inheritance in an effort to gain for the moment a mere mess of pottage, or a few pieces of silver. If

this restraining doctrine were not announced by any of the writers of the common law, because no such case was ever brought before the courts of England, it was unmistakably and indelibly carved upon the tablets of Mount Sinai.

Of course, nothing we have said in this opinion is to be understood as withdrawing in the least from a minor child its right of protection against a cruel and unkind parent. Should the occasion arise, or whenever necessary, the State will provide for its care and custody, because it is interested in its welfare; and, if need be, an offending parent will be visited with the pains and penalties of the criminal law. See C. S., ch. 90, on the subject of "Child Welfare." The right of a minor child to bring an action against its parent in respect to the latter's dealing with its property is unquestioned; but this right rests upon another principle, not involved in this proceeding. The law will not permit a parent, or other, to take the property of a minor child, or any one else, hold it unlawfully, and thus profit by his own wrong. This would be an unjust enrichment which the law cannot condone. *Walker v. Crowder,* 37 N. C., 487.

There is no authority at the common law for an action like the present; and while some may not regard the sources of the common law with reverence or with respect, yet, in its truest and most comprehensive sense, the common law is the richest heritage of the race. It is the embodiment of usage and general customs, common to all mankind; it is grounded in natural justice, and it is based upon rules of conduct which have been sanctioned by common consent and approved by the wisdom and experience of the ages. In this broad sense, it is contemporaneous with history itself; in fact, it is history; and the sources of both are lost in the mystery that characterizes all origins. There is no statutes in North Carolina which authorizes an action of this kind, and we are of opinion that the judgment sustaining the demurrers is in keeping with a sound public policy. For this reason the judgment must be upheld.

Affirmed.

CLARKSON, J., having been of counsel, took no part in the consideration or decision of this case.

HOKE, J., concurring: At common law an action for a pure tort was not maintainable by a minor child against its parents while a member of the family. For wrongs involving a trespass to, or a misappropriation of, property an action would lie. For in that respect the child is regarded as a separate entity, and a different principle prevails. But for torts disconnected with contract or proprietary rights, in so far as

examined, no such action has heretofore been maintained in England, and whenever it has been attempted in the American courts, such a right has been consistently rejected, and as shown in the principal opinion, the text-books of established merit are in full approval of the principle. Not only is this true by authority, but the position is in accord with right reason. We have had occasion to note, in several of our more recent decisions, that the influences which proceed from a well ordered home are among the chiefest bulwarks of our social order, and for that reason, among others, a family has been always regarded by the law as a government within itself, and to be interfered with only when required for the preservation of the public peace, or for the protection of dependent children as members and potential citizens of the commonwealth. But an interference on any other principle in breach of the family ties and relationships has thus far never been recognized or tolerated.

And the objections urged to the court's ruling on the resent record are so inadequate and at times irrelevant that they tend rather to confirm than to weaken the decision on the question presented.

It is contended in the first place that the action is really against the Indemnity Company, and an effort to interpose this wholesome common-law principle, to which we have referred, in protection of such company is the merest "camouflage," but not so. The reason it is required to take note of this alleged right of action on the part of the child against the parent is because the Indemnity Company in its contract has made express stipulation that no liability shall arise against the company unless and until a judgment is first had against the principal—in this instance the father—and therefore it is that the liability of the father is a condition precedent to that of the company, and must first be considered and determined. Such a position can by no means be considered as camouflage, as we understand the meaning of the term, but it is upholding the integrity of contracts, a principle which lies at the very base of all confidence among men in their business dealings with each other, and in this instance is required also to the proper administration of impartial justice alike to the corporation and to the individual.

Again it is insisted that the courts in their triumphant march towards higher and better things have struck off the shackles which have hitherto restrained the wife from suing the husband in such an action as this, and by that same token the child should be allowed to sue its parents in like case, and *Crowell v. Crowell,* 180 N. C., 516, is cited in support of the principle. An examination of this, and like cases, however, and the opinion of *Associate Justice Stacy,* denying a petition to rehear the *Crowell case, supra,* in 181 N. C., 66, will disclose that this right of the wife is based on certain recent legislation, making such definite provision as to her right to maintain this and all other litigation affecting

her interests that the policy of the law upon which this principle rests is held to have been altered as to the wife, by the legislative will; and for that reason the action by the wife was sustained, but there has been no such legislation in reference to the case of parent and child, and therefore the principle of the common law which forbade the maintenance of any such action as between them should still be allowed to prevail.

Again it is urged, and with some vehemence and iteration, that to sustain the demurrer on the facts of the present record would be to withdraw the benefits of the law and its courts in cases where it is most needed, to wit, the protection of the weak and of the helpless; but, to my mind, this does not correctly interpret the conditions presented. On the contrary, it is well known that the law of North Carolina is full and searching in its protection of dependent, minor children; so much so that a special department of the government is created and its places filled by humane and diligent, capable officials whose special duty it is to exercise supervision over this matter; and in every county in the State special courts have been established before which vicious, or at times even improvident, parents may be summoned, and there have the conditions and treatment of their children inquired into; and in the decisions of these courts the welfare of the child is more and more recognized as the controlling principle. In addition to this, the arm of the criminal law may be invoked, when necessary, to restrain the strong, to punish the vicious, and to protect the weak and the helpless. Truly the law of North Carolina is ample for the purpose indicated, and the courts have been always swift to enforce it by proper procedure. But the disposition of the matter now before the Court in no way impairs, or tends to impair, the beneficent provisions of this legislation. Our present decision merely holds that a minor child, living in the family and dependent upon its parents for support, may not institute a private civil suit of this kind against them for its own pecuniary benefit, a proceeding which would tend to invade and break down the integrity and sanctity of the home, and oftentimes in its practical operation might result in the impoverishment of worthy and struggling parents and utterly disqualify them from performing the duties imposed upon them by the law to maintain and nurture all of their helpless offspring. In my opinion, the opposing position insisted upon by these appellants is unwise in policy, unsound in principle, and without support of any well considered authority.

I concur in the opinion which sustains the demurrer and holds that no right of action is presented.

CLARK, C. J., dissenting: J. C. Small took out a policy with the Globe Indemnity Company, one of the defendants, "To indemnify the assured against loss from the liability imposed by law upon the assured

for damages as a result of the ownership, maintenance or use of any of said automobiles on account of bodily injuries, including death, at any time resulting therefrom accidentally suffered or alleged to have been suffered by any person or persons," etc.; and the company further agreed in the policy that, "in the event of suit being brought against the assured on account of such accident, to defend such suit, even if groundless, in the name and on behalf of the assured, unless or until the company shall elect to effect settlement thereof."

It is alleged in the complaint, and is admitted by the demurrer, that the assured, J. C. Small, while driving his automobile, had a collision with an automobile driven by John R. Morrison, by "both acting carelessly and negligently at the time," in which Mildred Small, who brings this action by her next friend, was injured; and that J. C. Small is insolvent, and she asks damages for the injuries sustained.

It was held by this Court in *Gorrell v. Water Supply Co.,* 124 N. C., 328, that "One not a party or privy to a contract, but who is a beneficiary thereof, is entitled to maintain an action for its breach." This has been often affirmed and is the settled law in this State and elsewhere.

This is a proceeding in equity by the beneficiary of a policy of insurance against the insurance company and against the men who negligently drove the automobiles, to assess and recover the damages sustained by her in the collision, and to be subrogated to the rights of the holder of the policy of indemnity, who is insolvent; and the defense interposed by the demurrer is that the holder of the policy is the father of the little nine-year-old girl who is seeking to recover in this action. There is no allegation of willful injury by the father, nor any indication that he is seeking to cause by collusion payment of the damages she has sustained.

The indemnity company demurs for misjoinder, and also that the plaintiff could not bring an action against her father. If the plaintiff's counsel had been well advised, he might have joined J. C. Small as a co-plaintiff, but under the reformed procedure it is immaterial on which side of a case a necessary party is placed, for their respective rights as between each other are settled by the judgment. C. S., 602. There was certainly no misjoinder of defendants, for both of the automobile owners are admitted by the demurrer to have acted negligently, and the policy of insurance set out in the complaint agrees to indemnify J. C. Small for any damages to any person accruing in his operation of the machine, and agrees that the defendant company shall be joined in an action to recover the same.

The defense by the defendant insurance company that J. C. Small is the father of the plaintiff is the barest camouflage, for under its contract it must pay any damages that might be sustained by any persons by reason of the negligence of J. C. Small in operating the machine. The

contract does not except injuries to any person, and the company is in no wise affected by the relationship of the party injured to the assured. This defense is interposed by the demurrer, like the traditional red herring drawn across the trail to divert the attention, or like the not unusual resort of defendants to change the issue or to try some other person. Indeed, eminent counsel has declared that when there is no real defense and no third party can be brought in, it is advisable to try the counsel on the other side.

But for the entirely irrelevant fact that the injured party happens to be the daughter of one of the defendants, it is admitted that she could have recovered upon the facts alleged in the complaint and admitted by the demurrer. It is also clear that, being a minor, her father could not have recovered for her any damages claimed by her, but the action must have been brought, as it was, in her name by her next friend.

But the contention presented by the demurrer is that because solely of the relationship, the party injured cannot recover the indemnity which the insurance company has promised to pay any person injured by J. C. Small in operating the machine. This action is in reality one by her against the indemnity company (for the demurrer admits that the father is insolvent) and Morrison.

If we are called on by the demurrer to consider the law applicable if it had been in fact an action by the child against the father, it may be stated plainly and without fear of contradiction that there is no statute or decree in this State, nor by any decision in the common law has it ever been held that a child could not bring an action against the parent. There have been many cases in this and other States and in England where children have brought actions against the parents; for instance, for partition of real estate, for conversion of the child's property, for support, and in other cases, and the right to do so has never been denied.

But it is argued by the defendant, to protect itself from liability for the damages, it agreed to pay those who, like the plaintiff, might be injured in the operation of the machine of the assured, "that such actions have always been other than torts," but this statement cannot be supported. There are cases in our Reports and others where actions have been brought for the children against their parents for conversion or embezzlement of the children's property, for libel and slander, and no decision can be found in England or in this State where the remedy has been denied to the children in any action on account of the relationship. The right of the children to maintain an action for the conversion of their property by the father was recognized in *Dunn v. Beaman,* 126 N. C., 771, and there are many others. The present action is not even for embezzlement or fraud, but merely for negligence and to subrogate the child, who is injured, for the father in the recovery of damages

according to the terms of the policy of the indemnity company for which the father has paid.

But it is claimed that the common law does not permit the child to be the plaintiff in any case in which the parent is a defendant. No case in England or in this State, or in America, as far as the fullest research goes, sustains this proposition. There is no such principle to be found stated in any case.

In 5 Wait's Actions and Defenses, 76, it is said, "In all cases of injury of a personal character, an infant has the same remedies as adults; and though the father of an infant may sue for personal injuries to the latter which cause him the loss of services or the incurring of expenses, yet that will not affect the infant's right of action for the damages sustained by himself. *Hall v. Hollander,* 10 Eng. C. L., 436; 4 B. & C., 660. He may even sue his parent for an unreasonably severe chastisement, amounting to a battery. Reeves Dom. Rel., 288."

In Eversley on Dom. Rel., 554, another English authority, it is said, "The right of a child to bring an action against his parent in respect to the latter's dealings with his property is unquestioned," and adds that whether the infant child can sue its parent for tort is not so clear, but "There is no rule of the common law to prevent such action being brought." And on page 555 it is said, "Where the tort is not for mere personal violence, but some other wrong, such as libel or slander, there does not seem to be any reason why an infant child should not sue its parent and recover compensation."

The following quotation from the 4 Am. Ed. of Reeves Dom. Rel., the leading English work on the subject, shows that at common law an action could be brought by a child against the parent, even for a tort in the most intimate relation. On page 357, it is said the maxim is "that the parent has power to chastise the child moderately. The exercise of this power must be in a great measure discretionary. He may so chastise his child as to be liable in an action against him for battery. The child has rights which the law will protect against the brutality of a barbarous parent." Again, on the same page, it is said, "When the punishment is unreasonable and the parent acted, *malo animo,* from wicked motives, under the influence of an unsocial heart, he ought to be liable to damages."

In the English Reports, it is said, "It is essential for the protection of infants that suits on their behalf should not be discouraged." *Sir John Leach, V. C.,* in *Stevens v. Stevens,* 6 Maddox, 97. In 2 Reeves English Law, 180, it is said, referring to ch. 15, Westminster II, in the reign of Edward I., providing that infants could maintain an action by a next friend, "This statute has always been construed as giving permission in all cases for infants to appear by their next friend; which, however, is nothing more than a confirmation of the common law."

From the above statements of the leading English authorities as to the common law, it will be seen that no judge in England has ever at any time held that a child could not maintain an action against its father, and that at common law such actions have been maintained not only in respect to dealing with the child's property, but in actions for slander and libel (Eversley on Dom. Rel., 554, 555); and as we have adopted the common law, our courts have no authority to change it unless it has become obsolete or contrary to the humanity of the age. C. S., 970. Two members of this Court, in *Crowell v. Crowell*, 180 N. C., 528, were of the opinion that the courts could not change the common law even when it had become contrary to the spirit of the age, saying that such matter is "addressed to the Legislature, and not to the judicial branch of the government." In *S. v. Bell*, 184 N. C., 719, *Mr. Justice Adams* stated the sound principle of law that "the duty of legislation rests with another department of the government. It is ours only to declare the law, not to make it," and *Mr. Justice Stacy*, in the same case, says that any change in law "is a matter for the Legislature."

Yet in this case we are asked by the defendant insurance company to change the well-settled principles of law as laid down by the English authorities as the common law of that country without a conflicting decision. In our own State the common law has been followed in this respect, and the dockets of the Superior Court swarm with cases where infants have been plaintiffs against their fathers not only in matters concerning the management of their property by the father, but in proceedings to compel him to support them, and in other cases. Some of these cases have come up to this Court, but no one has ever pleaded, and no judge has ever held, that the child cannot sustain an action against the father. To so hold would put children "out of the law" and make them "outlaws"—and why should they be outlawed?

Among the numerous cases in this Court of actions by children against the father is the recent one of *Sanders v. Sanders*, 167 N. C., 319, where the action was brought by two children against their father; and the Court sustained the liability of the father in that action, which was dismissed only because the relief sought of the support of the children had been granted them in another case. In *Dunn v. Beaman*, 126 N. C., 771, the Court held that the children could recover from their father money received for their lands sold by order of court which the father converted to his own use; and there are numerous other cases in which actions by children against the parent have been sustained, and not one in which the child has been outlawed or refused the protection of the court upon the ground set up by this insurance company that the child cannot bring an action against the parent.

In *Kimborough v. Davis*, 16 N. C., 74, a recovery was sustained for the child as beneficiary under a contract in his favor by the father. In

the present case the action is brought upon a policy issued by the insurance company to the father of the little girl, and she is suing to recover from the company the money promised to the beneficiaries of that contract. In *Becton v. Becton,* 56 N. C., 422, an action was brought by the children through parties styled "relators" and not "next friend" as required by the statute, and the decree was held valid.

In *S. v. Bell,* 184 N. C., 701, we have the same state of things, for though the action was brought in the name of the State, it was in effect entirely a civil proceeding in behalf of the four infant children for support against the father, who had abandoned them, for there was no penalty or fine prescribed in the statute (C. S., 4447), but merely a decree that the father should pay monthly the sum of fifty dollars for the support of the children. It was simply a civil proceeding, the State acting through the solicitor as the next friend, the four little children being the real parties in interest.

Walker v. Crowder, 37 N. C., 478, is another of the numerous cases in our Reports where the action was brought by the children against the parents to recover the value of their property which the father had wasted; and that case has been cited, among many others, in *Haglar v. McComb,* 66 N. C., 361, where the children recovered in an action on their behalf against the administrator of the father.

In *Burton v. Belvin,* 142 N. C., 153, the Court gave a recovery in the name of the mother for the benefit of an illegitimate child whom the father had promised to support, the Court holding that such proceeding, as in the late case of *S. v. Bell, supra,* "is not for the enforcement of punishment, but is in effect a civil remedy for the support of the woman and child and to save the taxpayers that expense," citing *S. v. Lisle,* 134 N. C., 735.

In *S. v. Kerby,* 110 N. C., 558, it was again held that a proceeding under the statute, which is now C. S., 4447, was in effect a civil proceeding in behalf of the real beneficiaries, the children, as the "true parties in interest," but in the name of the State as next friend, there being no punishment imposed, but a decree entered for a fixed amount to be paid by the father for the support of the children.

In *Gully v. Gully,* 15 A. L. R., 564, it was held that a decree could be entered against the father for support in behalf of his minor children, and on pp. 569-571 this is fortified by numerous citations from many States, among others, citing *Sanders v. Sanders,* 167 N. C., 319, in which the action was brought, as above stated, by two children against their father for support.

The same principle is laid down in 9 A. & E. (2 ed.), 871, holding the father liable to the children for their support, even when there has been a decree of divorce which is silent as to the custody and support of

the children. These actions were evidently brought by a next friend, for no one else had authority to sue for them as the true parties in interest, and the identical names of the plaintiffs and defendants, as cited in the note, indicate the same.

In 14 Cyc., 812, it is said that at common law the father remains primarily liable for the support of the children even when there has been a divorce and the custody of the children has not been awarded to the mother. The authorities cited to that effect are numerous. The same is held, with citation of numerous authorities in 19 C. J., 353, even when there has been a divorce and the custody of the children has not been awarded to the mother or any one else; and the note cites the above case of *Sanders v. Sanders,* 167 N. C., 319, where the action, as already stated, was brought by two children against their father for support, and, indeed, could have been brought by no one else except by them, either through a next friend or at the instance of the solicitor, as in *S. v. Bell,* 184 N. C., 702; and exactly the same liability of the father for support in an action on behalf of the children is set out in 8 R. C. L., 307, and 20 R. C. L., 622, calling attention to the fact that the proposition that a father was not liable to an action on behalf of his infant children for their support, as held in one early American case "was startling and opposed to any sense of justice of the courts."

As it is well settled, therefore, that actions lie in behalf of children, usually through their next friend, as in the present case, for conversion or embezzlement of their property by the father, or to recover a decree for their support by him, and in other cases, and there is no statute or decision in the English courts or in this State to deprive the child of the right to have its wrongs heard and passed upon in a court of justice, by what authority can we in this Court now create the "outlawry" of the children of this State, and hold that the courts cannot redress their wrongs when inflicted by the father?

As was said in *Pressly v. Yarn Mills,* 138 N. C., 410, "The law is not fossilized. It is a growth. It grows more just with the growing humanity of the age and broadens with the process of the suns." The advance of civilization is reflected nowhere more surely than in the administration of justice. As *Lord Erskine* said, "Morality comes in the cold abstract from the pulpit, but men smart practically under its lessons when we lawyers are the teachers."

The crudeness, not to say the brutality, of the common law, framed in a rude age, has been gradually modified by later decisions and statutes making the law more humane, and opening the door of justice more widely to all, without distinction of race, color, age, or sex. Much of this has been done by statute, but where the statute has lingered the courts have led the way of wider justice to all without distinction.

Never before now has this Court ever been called upon to take the backward track and bar the claim of justice to the weak, or to "outlaw" the children of the land from their just demand to have their pleas heard for redress of wrongs.

In a rude and barbarous age Hebrews were debarred not only from holding office, but outlawed from testifying in the courts, a position in which it is now sought to place the children of this State; but the day long since came in England when a Jew, as prime minister, elevated the chief executive of that land, though a woman, to be empress over hundreds of millions of people in India; and this Court, in a recent decision, in *Munick v. Durham,* 181 N. C., 188, declared their equality before the law in every respect.

At common law a woman could not sue her husband because on marriage her property became his, and any recovery by her against him would have been useless. By the Constitution of 1868, she was given her property and the right to sue her husband, but in *Price v. Electric Co.,* 160 N. C., 450, the majority of the Court held that, notwithstanding this change in the Constitution, the husband alone could recover, for his own use and benefit, damages for her personal injuries and for the agony, when the jury had assessed the wife's injuries. The succeeding Legislature promptly corrected that wrong. Laws 1913, ch. 13.

For centuries wives had to endure under the common law the brutalities of their husbands, because, as is claimed by the insurance company in the present case, to "give publicity to family troubles is not advisable," and therefore it was held in the courts of this State, till *S. v. Oliver,* 70 N. C., 61, in 1874, nine years after the whip had been taken from the hand of the master, that the husband was still master of his wife, with the right to use the lash on her at his will, and that she could not complain to a court of justice for protection, except in cases of permanent injury, one judge saying that this was "necessary because it was the husband's duty to make her behave herself" (*S. v. Black,* 60 N. C., 263), and a later decision put it on the ground that to allow the wife to ask protection of a court would be unseemly publicity, and therefore the courts must stifle the sobs of the victims, and held that their demands for justice and protection could not be heard in a court of justice. *S. v. Rhodes,* 61 N. C., 454.

For years it has been common knowledge that, owing to the immorality of husbands, women have been subjected to the untold horrors of shameful disease, wrecking their health and causing them to bring into the world deformed and imbecile children, or tainted with insanity or criminal tendencies, but the courts would hear no complaint from the wife because it was "better that such things should not be blazoned to the public."

We know that in the late war the examination of soldiers for service brought out the fact that in North Carolina the percentage of men rendered unfit for service due to this fact was larger than in almost any other State in the Union. The medical profession tells us that insanity, imbecility and predisposition to crime are largely due to this cause, but for years the wife could not make complaint. She had no remedy at the hands of the law because, as the insurance company claims in this case, "it were better that publicity in domestic matters should not be aired in public." But in consequence of the act of 1913, the ban of outlawry upon the wives of this State was lifted, and in *Crowell v. Crowell*, 180 N. C., 524, this Court declared the emancipation of women and their full admission to demand justice in the courts in these words, "Whether a man has laid open his wife's head with a bludgeon, put out her eye, broken her arm, or poisoned her body, he is no longer exempt from liability to her on the ground that he vowed at the altar to love, cherish and protect her. Civilization and justice have progressed that far with us, and never again will the sun go back ten degrees on the dial of Ahaz. Isaiah 38:8."

At common law the wife was outlawed from demanding justice in the courts, and her property became that of her husband. But no judge in England nor in this State, till this hour, has ever held that children could not complain to the courts and obtain remedy against the father for injuries to their property or their person. Why should we turn back on the road of justice and civilization and by judicial decree make them outlaws now?

The time was when slaves and convicts had no rights and could not be heard in the courts to complain of mistreatment, nor were their oaths admissible even in behalf of others in a court of justice. But there are no slaves now. And even as to convicts, in *S. v. Nipper*, 166 N. C., 272, and *S. v. Mincher*, 172 N. C., 900, this Court condemned the brutality and illegality of the corporal punishment of convicts, and held that they were entitled to be heard and their oaths taken in a court of justice. They are no longer "outlaws" whose complaints cannot be heard in a court of justice.

The insurance company in this case is asking that we shall, by judicial fiat, make the children of this land "outlaws" when outlawry has ceased as to all other classes of the community, and has never existed as to children, and it can be said in the language of Bishop Hooker, the great English divine, "Of law, the least that can be said is that her voice is the harmony of the universe. All things in heaven and earth unite to do her reverence. The greatest as subject to her power and the least as sheltered by her protection."

In the progress of the ages we have admitted the right to be heard in the courts of women, of men of all races and complexions, and of convicts. The defendant insurance company asks that we shall now turn back the clock of the ages and the onward sweep of universal justice by decreeing that it shall be exempted from the payment of the damages sustained by this little girl because in this equitable proceeding to subrogate her to the rights accruing to her father for damages sustained, it is necessary to make the father a party, and therefore she cannot be heard.

Policies of insurance like the present, agreeing to pay damages adjudged against the owners of automobiles because of their negligence are now common, and there is no exception in the present policy of injuries sustained by any one. At this very term, in *Roberts v. Roberts, ante,* 524, we have held that the wife, who was injured under similar circumstances as in this case, could recover against her husband. Upon what principle of law, by what rule of logic, shall we hold that the little daughter who was injured, probably for life, and who is the beneficiary of the same provision in the policy, shall not recover simply because her father as the policyholder is a necessary party in the equitable proceeding to assess the damages she has suffered, and she seeks to be subrogated to the rights of the insolvent father to recover as beneficiary under the terms of the policy.

We have held in *Roberts v. Roberts, supra,* that the wife can recover of the husband her damages, as in *Crowell v. Crowell, supra,* the object being to collect the judgment out of the insurance company. In this case, instead of a simple action at law of that nature, this equitable proceeding is brought, as in *Benton v. Collins,* 118 N. C., 196, where the action was for tort, the shooting of plaintiff, and in *Fisher v. Trust Co.,* 138 N. C., 224 (action for fraud), making the owners of both automobiles, the insurance company, and the beneficiary of the policy all parties, to the end that the negligence and injuries, the assessment of damages and the rights of the beneficiary shall all be determined in one action.

This is in accordance with the theory and practice of the courts of equity, and justice demands that the little girl shall receive the compensation which is due to her under the terms of the policy, and there is no foundation in precedents or logic or law which can justly debar her from standing at the seat of justice and being heard because the insurance company claims that it is "unseemly that a child should be on the opposite side of a case from her father." The dockets of the courts and the Reports of the courts show many instances in which children have appeared as plaintiffs and their fathers as defendants.

In *Bird v. Black*, 5 La. Ann., 189 (1850), it was recognized that there was no legal prohibition against a child's suing its parent in any class of cases, for it held that, "Suits of children against parents are not to be encouraged unless to redress clear and palpable injuries. Filial duty ought to restrain the child from exposing the faults of its parents or worrying them with litigation unless compelled by extreme necessity."

In *Clasen v. Prugh*, 69 Neb., 278, it is held, "A parent, or one *in loco parentis*, is not liable, either civilly or criminally, for moderately and reasonably correcting a child, but it is otherwise if the correction is immoderate and unreasonable," which is a clear recognition that actions will lie by a child against its parents even in that class of torts.

The very first indication of any limitation upon the right of the child to recover against the parent will be found not in the common law, but in *Hewlett v. George*, 68 Miss., 703; 13 L. R. A., 682, as late as 1891, where it was held that a child wrongfully imprisoned in an asylum could not bring an action against her mother therefor. That decision does not allege that such action was prohibited at common law, but states that it is based upon the Court's opinion of public policy." Thus, the Court itself was making the law. That case is printed in 1 Anno. Cas., p. 132, and the notes thereto state that it was then "The only authority forbidding an action by a child against a parent." This was followed by *McKelvey v. McKelvey*, 111 Tenn., 388 (1902), reprinted in 102 Am. St., 787, and in the note thereto, on p. 790, it is stated that the decision of the Mississippi Court is "the only authority prior to that case "setting up this doctrine," and on p. 788 (102 Am. St.), it is said that "no less celebrated an authority than *Judge Cooley* on Torts, at p. 171, observes that "On principle there is no reason why such action should not be maintained," and adds that "With the utmost diligence, the only case found prohibiting such action was the Mississippi case above cited, and that is based not upon the common law, nor upon statute, but upon the ideas of that judge as to the public policy of permitting such actions." On the next page (p. 789) the Court says such prohibition can be asserted only by analogy to the right of a wife to sue a husband, and quotes from 67 Maine, 304, which said, as to the right of a wife to sue her husband (which has been allowed in this State for now more than half a century), that the wife cannot bring such action because "there is no necessity for it. Practically the married woman has remedy enough." Adding that she can have a writ of *habeas corpus*, and if necessary, she can bring an action for divorce!

In *Roller v. Roller*, 37 Wash., 242 (107 Am. St., 805), 1905, it is held that "a minor child cannot sue his parent for damages arising from tort committed by the parent against the child, where the relation of parent and child exists," but that case which was for personal violence to

the child is put upon the ground of public policy, and is based entirely upon *Hewlett v. George,* 68 Miss., 703, which it says is "the only one that we have been able to discover" which lays down that doctrine.

In *Foley v. Foley,* 61 Ill. App., 577 (an intermediate court), it is stated that an action by a child for physical ill-treatment against one *in loco parentis* will not lie, but no authority is stated for the proposition, and there are numerous cases in the reports of such actions against those *in loco parentis* for brutal treatment.

In 29 Cyc., 1642, it is said, "Where the tort is purely personal to the child, it seems that the parent cannot recover," but the cases cited show that this means that the action must be brought by a next friend and not by the father. In 29 Cyc., 1663, it is said, "Actions by children against their parents are not to be encouraged," citing *Myers v. Myers,* 47 W. Va., 487, "unless to redress clear and palpable injustices," citing *Bird v. Black,* 5 La. Annual, 189, *supra,* which recognized that the action lies, and added "and a minor child has no right of action against the parent for the tort of the latter," but the cases cited for the latter proposition are, as already stated, all based upon *Hewlett v. George,* 68 Miss., 703; 13 L. R. A., 682, which originated such proposition in 1891. Yet these are the authorities and the line of reasoning upon which defendant seeks to create for its own benefit a new proposition in this State, not based on common law or any statute, that shall deprive a child of the right to sue its parent in any case whatever.

In Schouler on Domestic Relations (3 ed.), 275, note 3, it is said in the note that precedents are wanting which hold that a child could not maintain an action against its parents, and added that "the policy of the common law appears to be hostile to permitting such suits," but no case is cited to that effect. If there had been such policy it would have been clearly enounced by numerous decisions.

Judge Cooley, in his great work on Torts (2 ed.), marginal page 171, says that "on principle, there seems to be no reason why such an action of a child against a parent should not be sustained."

The above are the only decisions denying the child the right of action against parents for its wrongs that we have been able to find, and all of these refer back to the Mississippi case in 1891, and in none of them is it asserted that there is a statute anywhere or any ruling in the common law which forbade an action by a child against its parent in any respect. Certainly the Mississippi Court, in 1891, could not create the common law for this State, and there can be no prohibition of such action to redress a grievance by the child against the parent unless there was a statute of this State, or it could be shown that it was a part of the common law. The reason given in these few decisions, all of such recent date, and only in actions for willful injury to the child, is either that

(in the opinion of the judges who followed the Mississippi case) sound policy forbade such action, or that by analogy to the prohibition formerly of actions by wives against their husbands, the courts would not permit an action by the children against parents. But in view of the common-law reason for prohibiting wives to sue their husbands, this latter argument could have no force. Besides, the same reason could not have applied between parent and child.

The common-law prohibition against actions by the wife against her husband—now happily universally repealed—was created solely by decisions of judges in the illiterate period when there was practically no statute law in England, and these judges during the formative period of the common law were, as pointed out by *Pollock & Maitland* and other writers on the subject, mostly priests or monks of the Catholic Church for nearly the entire period. They saw fit to lay down the prohibition of action by wives against husbands upon the ground of the unity of husband and wife, as stated by *Adam* in II Genesis, 23. The real reason, however, was the fact that by the customs and economical conditions of that age, the wife was a chattel absolutely subject to the control of the husband, and upon marriage her property became his. Logically, therefore, if she could have brought an action against her husband for damages, the recovery would have inured to the husband. Of course, under these circumstances no action would lie. But as to the child, it was held in that day, as now, that his property, where he had any, was his own, and the father could not sue to recover property or damages for the child. Even as to real estate, it was then held that it would descend, but would never ascend, and, therefore, the father could not even inherit from the child, and all the decisions were then, as now, that it was necessary to have a guardian appointed for the child's property. The extent of the father's interest therein now reaches no further than this, that in the appointment of a guardian, other things being equal, the father will be preferred for appointment by the court.

As to the allegation that there is a remedy by an indictment and not by a civil action, this was never a defense to actions against the father for embezzlement or conversion of the property of the child, both of which are indictable. In those cases, as in this, indictment would be no reparation to the child, and besides, in this case, the injury is alleged to have been caused by negligence, and therefore the father was not even subject to indictment, and the action is, in fact, against the insurance company and not against the father.

The provision that no action shall lie against the company unless brought after the amount of such claim or loss shall have been fixed and rendered certain by a judgment against the assured taken alone might justify sustaining the demurrer for misjoinder; but the further

provision in the policy by which the company agreed, "in the event of suit being brought against the assured on account of such action, to *defend such suit,* even if groundless, in the name or on behalf of the assured," together with the allegation in the complaint, which is admitted by the demurrer, that nothing can be recovered against J. C. Small upon execution, makes in effect the defendant company and Morrison the necessary, if not the sole and real defendants in the action.

In no view can the demurrer of the indemnity company on the ground that the plaintiff cannot bring an action against her father for the tort be sustained. That in no wise concerns the indemnity company, whose obligation is to pay whatever damages shall be adjudged against J. C. Small, which matter, to a great extent, will depend upon whether he was or was not jointly responsible with the codefendant Morrison in causing the accident. If there was no negligence on the part of Small, the action could still be sustained by the plaintiff, certainly as to the defendant Morrison, if negligence was shown as against him.

To sum up, therefore, this is an action by a child injured in an automobile accident, seeking to recover damages for negligence against the insurance company upon its contract to indemnify her father for any damages caused by his negligence in the operation of his machine. The indemnity company in setting up the plea that the child cannot sue the father is not seeking to carry out the Fifth Commandment or to enforce relations between parents and children, but to exempt itself from its obligation to the father, made in consideration of his money paid for that purpose, of reimbursing him for any damages which might be caused to any one by his operation of the machine. There is no statute and no common law forbidding the child to make this recovery to which besides it is entitled under the very terms of the contract as well as under the general law as being a beneficiary therein.

There is no provision in the common law nor by any statute forbidding the child to maintain an action against the parent in any case, and the very few decisions in this country that forbid such action did not originate in common law, or by statute, but began, as above stated, with the Mississippi decision as late as 1891, and they only imposed a restriction to the extent of forbidding actions for personal violence towards the child by the parent. Even that ruling would not apply in this instance, where the action is by the child as beneficiary of a policy for indemnity, when there is no violence exerted by the parent against the child, and the relationship is purely an incidental matter and irrelevant, by which it is sought to exempt the indemnity company from its liability upon the policy it issued to the father.

The doors of the Temple of Justice should always stand wide open, and to every one. Least of all should they be closed to the weak and

"those who have no helper," for most of all they need its protection. The common law, framed in a rude and illiterate age, gave to husbands the property of their wives upon marriage, but it never gave to fathers the property of their children. The common law brutally gave to the husband not only the property and personal earnings of his wife, but the right to recover and to appropriate to his own use compensation for injuries to her person and for her sufferings and her agonies, and even for the loss of a limb, because she was his property. *Price v. Electric Co.*, 160 N. C., 450. But the common law never gave to the father the right to sue for damages for personal injuries sustained by his child, except to recover the value of his wages until of age. Such action, then as now, must be brought by the child. There were thus radical distinctions at common law between the status of wife and child.

But recently in the adjoining county from which this case came a father so treated his little daughter that it was found necessary to incarcerate him in jail to save him from summary justice at the hands of his fellow-citizens. If he were a wealthy man, he might still carry his animosity to the extent of depriving her of all share in his estate. Suppose her injuries were permanent as the loss of an eye or an arm, whether she was nine years of age or twenty, should she be deprived of all compensation for the damages she has sustained simply because the wrongdoer was her father? There has never been such a holding in the common law, nor such statute anywhere, and no such decision in this State. By what authority can the courts now create such law, and by their own fiat shut the doors of justice in the faces of the helpless, who do most need protection?

The assertion that this should be done upon the ground of public policy is not for the courts, but for the Legislature. It was upon the same plea that it was better that even unutterable wrongs should be suffered by wives and endured by the victims in silence than that there should be publicity given to the wrongdoings of husbands, which wrecked the bodies and lives of wives, and that without remedy until the act of 1913 enabled this Court to make the decision in *Crowell v. Crowell*, 180 N. C., 516, followed in *S. c.*, 181 N. C., 66; *Dorsett v. Dorsett*, 183 N. C., 356, and by *Roberts v. Roberts, supra.*

There was never common law nor statute to justify the denial of legal rights to children. The courts should not create law to exclude them from justice when there has been a legal wrong. In a recent work, Pound's Common Law, 189, it is said, "Recent legislation and judicial decision have changed the whole attitude of the law with respect to dependent members of the household. Courts no longer make the natural rights of parents with respect to children the chief basis of their decisions. The individual interest of parents, which used to be the one

thing regarded has come to be almost the last thing regarded as compared with the interest of the child and interest of society. In other words social interests are now chiefly regarded."

This case is an attempt by the plaintiff to reverse this order and to create for the purpose of the indemnity company a principle never heretofore existing at common law or by statute, or by decision in this State, and which will, if followed, subject all persons under twenty-one to exclusion from compensation for any injury if inflicted by those who ought to be and usually are their protectors. But while the majority of parents are kind and forbearing, the law is especially for the protection of the helpless, who are unable to protect themselves against wrongdoers.

The plea that publicity should be avoided by silencing the cries and ignoring the suffering of the helpless is not one that commends itself to humanity. Publicity and the arm of the law are what is needed for the protection of those who are otherwise in the absolute and irresponsible power of those who inflict injuries. While this case is not an allegation of a willful wrong by the father against the daughter, the assertion of the irresponsibility of the parent and his immunity against all claims of children for protection at the hands of the law should not go unchallenged.

Even if it had been true that "at law," under the old system, the daughter could not maintain this action because her father was necessarily one of the defendants, the court of equity to "prevent a defect of justice" would have maintained the suit that the daughter should not lose the compensation for her injuries due by the company under its contract with her father. She was entitled to this, both because her father was insolvent, and because unless the action was brought in her behalf by her next friend she would be deprived of the recovery. The father could not bring an action for damages for personal injuries sustained by her even if he were not a defendant, but it must be brought by her next friend. 20 R. C. L., p. 615. He could not pay her the damages even if solvent and recover it of the company, for to prevent collusion the terms of the policy require that there must be a judgment against him, to which action the company must be made a party. It would be a most flagrant defect of justice if, under all these circumstances, this proceeding in equity by the next friend could not be maintained. It should be held, as it is in fact, to be a suit in equity, and all the defendants are necessary parties thereto. *Fisher v. Trust Co.*, 138 N. C., 224; *Benton v. Collins*, 118 N. C., 196, and numerous others cited in those cases and in the annotations thereto.

It is the essential function of the courts to administer justice, and while they will not overrule a statute, they should not hesitate to overrule a precedent to attain that end when it has not become a rule of

property. For a stronger reason, the courts should never *create* a precedent (when there is, as here, neither statute nor precedent) upon a supposed public policy, and when, as in this case, it will deprive any one of just rights.

The wife has obtained after a long struggle the right to be heard in courts of justice against wrongs inflicted by her husband, which was denied her formerly upon the ground that "domestic troubles should not be brought into court, and therefore the victim should suffer unheard." There was never a provision of common law or in this State which deprived the child of maintaining its right to recover for its property wasted by the father, or to a support at his hands, or for the wrongs inflicted by him, and there is no authority in the courts to create a disability now where none has existed up to this time. Justice should be done to all. The complaints of all should be heard and wrongs, if proven, redressed without distinction of race, of sex or of age.

"For justice, all places are a temple and all seasons summer."

The Master said, "Suffer little children to came unto me and forbid them not." Certainly justice should not forbid them to plead their wrongs at her altar.

The demurrer should be overruled and a jury should determine whether the plaintiff has been injured by the negligence of both or either of the automobile owners, and if so, the damages she is entitled to recover. If any part of the injury is found to have been caused by the negligence of J. C. Small, the plaintiff, as beneficiary in the policy, should be subrogated to the amount of his recovery against the indemnity company.

F. B. HARWARD AND NINA HARWARD v. C. C. EDWARDS.

(Filed 28 February, 1923.)

Estates—Remainder—Fee Tail—Statutes—Fee Simple—Deeds and Conveyances.

An estate to H. during her life, with remainder to the testator's son "and his bodily heirs," vests a life estate in the land in H., with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. C. S., 1734. And upon the falling in of the life estate, the son can convey a good fee-simple title. *Chamblee v. Broughton*, 120 N. C., 170; *Leathers v. Gray*, 101 N. C., 163, cited and distinguished.

APPEAL by defendant from *Horton, J.*, at January Term, 1923, of CHATHAM.

Civil action, heard on an agreed statement of facts. There was a judgment for the plaintiffs, and the defendant appealed.

No counsel for plaintiff.
Long & Bell for appellant.

ADAMS, J. On 20 December, 1922, the plaintiffs contracted to sell and convey to the defendant at an agreed price a tract of land containing 140 acres. At that time the defendant made a small cash payment and agreed to pay the additional sum of $1,400 upon delivery to him by the plaintiffs of their deed conveying an indefeasible title in fee. The plaintiffs made tender of their deed and demanded payment of the remainder of the purchase money, and the defendant declined to comply with such demand on the ground that the plaintiffs could not convey a good title.

The plaintiff F. B. Harward derived title to the land through his father's will, and the validity of his title depends upon the interpretation of the second and third items, which are as follows:

"2d. I give and devise to my beloved wife Martha Ann Harward all my property, real, personal, and mixed, of what nature or kind soever, and wheresoever the same shall be at the time of my death. During her life, at her death I give and bequeath unto Donnie Harward's two children twenty-five dollars each, namely Leo and Lelier May Harward.

"3d. And whatsoever is remaining of my real and personal property I give and devise to my son F. B. Harward and his bodily heirs at his death."

The devisor and his wife are dead. These two clauses of the will vested in Martha Ann Harward a life estate in the land with an estate tail in remainder to F. B. Harward, which by virtue of the statute is made a fee simple. C. S., 1734; *Parrish v. Hodge,* 178 N. C., 133; *Keziah v. Medlin,* 173 N. C., 237; *Revis v. Murphy,* 172 N. C., 579; *Sessoms v. Sessoms,* 144 N. C., 121; *Willis v. Trust Co.,* 183 N. C., 267.

It will be observed that the testator did not devise the land to F. B. Harward for life, with remainder to his bodily heirs. In this respect the case at bar differs from *Chamblee v. Broughton,* 120 N. C., 170, and *Leathers v. Gray,* 101 N. C., 163 (overruling the former decision in 96 N. C., 548), and similar cases, in which the rule in *Shelley's case* was applied.

His Honor was correct in adjudging that the plaintiffs can convey an estate in fee, and the judgment accordingly is

Affirmed.

STATE v. JERRY DALTON.

(Filed 21 February, 1923.)

Appeal and Error — Docketing — Dismissal—Capital Felony—Escape—Criminal Law—Rules of Court.

Upon the failure of appellant to docket his appeal in the Supreme Court from the conviction of a capital felony, within the time prescribed by the rule, it will be docketed and dismissed unless a motion is made for a *certiorari* at the next succeeding term, and sufficient cause shown for the failure to docket in time; and the fact that he had fled the State and remained absent until arrested and brought back entitles him to no special favor. It would be discretionary with the court to affirm the judgment or dismiss the appeal, or continue the case, if the appeal had been docketed within the time required by the rule.

APPEAL by defendant from *Bryson, J.*, at April Term, 1920, of MACON.

PER CURIAM. It appearing from an inspection of the record that the defendant Jerry Dalton was tried and convicted of murder in the first degree at the April Term, 1920, of the Superior Court of Macon, and from the judgment on such conviction appealed to this Court, but did not docket his appeal until 22 January, 1923, after six terms of this Court after such appeal was taken, on motion of the Attorney-General the appeal is docketed and dismissed.

The decisions of this Court have been uniform that on failure to docket the appeal in the time prescribed, it will be docketed and dismissed unless a motion is made for *certiorari* at the next succeeding term and sufficient cause shown for failure to do so.

This whole matter was discussed fully at last term with full citation of authorities in *Rose v. Rocky Mount*, 184 N. C., 609.

If the appellant had docketed his case in time and then escaped pending the appeal, the Court might either affirm judgment or dismiss the appeal or continue the case, in its discretion, and it would make no difference that the appellant was convicted of a capital felony. *S. v. Jacobs*, 107 N. C., 772, and *S. v. Devane*, 166 N. C., 281, in which the uniform decisions are cited and approved.

In this case the defendant not only shows no excuse for failure to docket, but admits that he had fled the jurisdiction of the State and remained absent until arrested and brought back. This certainly puts him in no better situation and entitles him to no special favor from the Court whose jurisdiction he evaded.

Appeal dismissed.

T. H. YARBOROUGH v. F. P. WOMACK.

(Filed 28 February, 1923.)

APPEAL by plaintiff from *Daniels, J.*, at September Term, 1922, of LEE.

Action to have plaintiff's endorsement in blank on two promissory notes declared restrictive or without recourse, it being alleged that the restrictive words were omitted from said notes by reason of the mutual mistake of the parties; and further, by reason of their ignorance of the necessity to use such restrictive words.

From a verdict and judgment in favor of the defendant, the plaintiff appealed, assigning errors.

Hoyle & Hoyle for plaintiff.
D. B. Teague and H. F. Seawell for defendant.

PER CURIAM. The controversy on trial narrowed itself principally to questions of fact, which the jury alone could determine. After a careful perusal of the record, we are satisfied that the case has been tried in substantial conformity to the law as bearing on the subject, and no sufficient reason has been found for disturbing the result below. All the exceptions are directed to alleged errors in the charge, but we have discovered nothing prejudicial or hurtful in this respect. The trial and judgment must be upheld.

No error.

G. H. GOODMAN ET AL. v. T. J. CALL ET AL.

(Filed 11 April, 1923.)

Appeal and Error—Appeal Bond—Dismissal—Motions—Conditions Precedent.

The bond required of appellant is a condition precedent to his right to have his case heard and determined on appeal, C. S., 647; and where, in response to appellee's motion to dismiss for failure to file the bond at least five days before the call of the district, the appellant fails to file a new bond according to law, or make a deposit, etc., appellee's motion to dismiss will be allowed.

APPEAL by plaintiff from *Finley, J.*, at Fall Term, 1922, of ASHE.

T. C. Bowie for plaintiff.
Parker & Johnson and R. A. Doughton for defendant.

PER CURIAM. This is a motion by the defendant to dismiss for failure to file a bond on appeal justified as required by C. S., 647. Notice of the motion was given 13 December, 1922, and service accepted by the plaintiff 26 December thereafter.

When the case was called in this Court, 3 April, 1923, the defendant's counsel tendered his check for the amount of the bond, but the statute, C. S., 648, requires that in response to a motion to dismiss on this ground "*at least five days* before the call of the district from which the cause is sent up, the appellant may file with the clerk a new bond justified according to law, or make a deposit of a sum of money equal to the penalty in the bond." This not having been done, the motion to dismiss must be allowed.

The provision for sending up appeals, whether in the rules of the Court or in the statute, are conditions precedent which must be strictly complied with to entitle the appellant to have his cause reheard in this Court. *Vivian v. Mitchell*, 144 N. C., 472, and cases therein cited, and citations thereto in Anno. Ed.

This is necessary to prevent vexatious and expensive delays, and for the protection of appellees. This Court has often called attention to the fact that compliance with these requirements is not optional, and that these regulations are not merely recommendations, and that the right of appeal is not absolute, but is dependent upon compliance with the provisions of the statute, to entitle the appellant to have his cause docketed and heard here. The motion to dismiss must be allowed.

Appeal dismissed.

ALLEN DAWKINS v. BOSS PHILLIPS AND WILL WATKINS.

(Filed 11 April, 1923.)

Courts—Criminal Terms—Motions in Civil Actions—Notice—Dismissal—Statutes.

It is required by the provisions of our statute, C. S., 1444, that due notice be given of motions in civil actions to be heard at a criminal term of court, and where the movant has failed to give the statutory notice of his motion, and the Superior Court judge has ordered a dismissal of the action, the judgment will be reversed on appeal.

APPEAL by defendant Will Watkins from *Brock, J.*, at December Special Term of FORSYTH.

This action was tried before *Starbuck, J.*, and a jury, in Forsyth County Court at May Term, 1922, to recover damages for personal

injuries due to the negligence of Phillips in driving an automobile belonging to the defendant Watkins, and plaintiff obtained judgment. The defendant Watkins appealed to the Superior Court at November Term, 1922, of Forsyth, and the plaintiff moved to dismiss the appeal of the defendant Watkins, for that he had failed to file the undertaking required by law. The motion was continued to December Term, 1922, which was a one-week criminal term. The motion was not heard at that term, but was continued and heard before *Brock, J.*, at the December Special Term, which was ordered for criminal cases only, at which term the motion to dismiss was allowed, and the defendant appealed.

Moses Shapiro for plaintiff.
John C. Wallace for Will Watkins.

PER CURIAM. C. S., 1444, provides that at criminal terms of the court "motions for civil action may be heard upon due notice, and trials in civil actions may be heard by consent of the parties." The order to dismiss was made at a special criminal term, and without notice being given of such motion. This being a civil action, the judgment of dismissal must be

Reversed.

JOHN R. WENTZ v. BURTON SYSTEM, INC., ET AL.

(Filed 2 May, 1923.)

Evidence—Nonsuit—Motions—Trials.

In this action to set aside a sale and transfer of personal property for fraud and false representations, the evidence was sufficient for the determination of the jury, and defendants' motion as of nonsuit thereon should have been denied.

APPEAL by plaintiff from *Webb, J.*, at October Term, 1922, of MECKLENBURG.

Action to set aside a sale and transfer of certain personal property, and for damages, it being alleged that the sale of the property in question was induced by fraud and false representations. At the close of plaintiff's evidence, judgment as of nonsuit was entered, on motion of the defendants. Plaintiff appealed.

Stancill & Davis, J. D. McCall, and John M. Robinson for plaintiff.
James A. Bell and D. B. Smith for defendants.

Per Curiam. Without stating the facts, which are somewhat complicated, and make a rather long story, we are convinced, from a careful perusal of the record, viewing the evidence in its most favorable light for the plaintiff, the accepted position on a motion to nonsuit, that the case should have been submitted to the jury. No benefit would be derived from detailing the evidence, as the only question before us is whether it is sufficient to carry the case to the jury, and we think it is.

The judgment of nonsuit will be set aside, and the cause remanded for another trial.

Reversed.

N. C. McLEOD v. J. W. LEMONS.

(Filed 26 May, 1923.)

Negligence—Contributory Negligence—Proximate Cause.

The contributory negligence of the plaintiff in a personal injury case will bar his recovery if it proximately produces the injury for which damages are sought by him in his action.

Appeal by plaintiff from *Brock, J.*, at September Term, 1922, of Montgomery.

Civil action for damages, tried upon the following issues:

"1. Was the plaintiff injured by the negligence of the defendant, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff by his own negligence contribute to his injury, as alleged in the answer? Answer: 'Yes.'

"3. What damage, if any, is plaintiff entitled to recover of the defendant? Answer: ....."

Judgment on the verdict for defendant. Plaintiff appealed.

C. A. Armstrong and J. A. Spence for plaintiff.
R. T. Poole for defendant.

Per Curiam. In a collision between plaintiff's buggy and defendant's automobile, plaintiff alleges that he was thrown to the ground and seriously injured. There was evidence tending to support the jury's finding on the first and second issues; and we have found no reversible error committed on the trial.

It is well established that in an action like the present the contributory negligence of the plaintiff which proximately produces the injury will bar a recovery. *Construction Co. v. R. R.*, 184 N. C., 179; *Moore v. Iron Works*, 183 N. C., 438.

No error.

STATE v. CHAFUS WHISNANT AND REUBEN WHISNANT.

(Filed 16 May, 1923.)

Evidence—Nonsuit—Trials.

The evidence on the trial of this action for violating the prohibition law is held sufficient to sustain a conviction, and warrant the refusal of defendants' motion to dismiss the action.

APPEAL by defendants from *Bryson, J.*, at September Term, 1922, of POLK.

The defendants were convicted of a violation of the prohibition law, and from the judgment they appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Quinn, Hamrick & Harris for defendants.

PER CURIAM. The defendants excepted to the court's denial of their motion to dismiss the action, but the evidence was amply sufficient to sustain the verdict. The exception is without merit. *S. v. Johnson*, 184 N. C., 637; *S. v. Jenkins*, 182 N. C., 818; *S. v. Killiam*, 173 N. C., 792; *S. v. Carlson*, 171 N. C., 818.

No error.

STATE v. JAMES A. RUSSELL.

(Filed 26 May, 1923.)

Appeal and Error—Evidence—Issues of Fact.

The verdict of the jury upon controverted evidence of fact will not be disturbed when it appears that no error of law has been committed on the trial.

APPEAL by defendant from *Finley, J.*, at November Term, 1922, of IREDELL.

Criminal prosecution, tried upon an indictment charging the defendant with procuring an abortion in violation of C. S., 4227.

From an adverse verdict, and judgment of two years in the State's Prison, the defendant appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

L. C. Caldwell for defendant.

PER CURIAM. On the trial the controversy narrowed itself to questions of fact, all of which have been settled by the verdict. After a careful perusal of the record, we are convinced that the case has been tried in substantial conformity to the law as bearing on the subject, and we have found no sufficient reason for disturbing the result below.

No error.

J. L. OWEN v. SUNCREST LUMBER COMPANY.

(Filed 8 June, 1923.)

Instructions—Employer and Employee—Master and Servant—Safe Appliances—Ordinary Care—Appeal and Error.

An employer is only required to provide his employee a reasonably safe place to work and reasonably safe appliances with which to do it, in the exercise of ordinary care; and an instruction upon the evidence which leaves out the requirement as to ordinary care imposes an absolute duty on the employer to furnish his employee with such place and appliances, and constitute reversible error to his prejudice.

APPEAL by defendant from *Ferguson, J.*, at January Term, 1923, of HAYWOOD.

The action is to recover damages for physical injuries caused by the alleged negligence of defendant company in failing to supply plaintiff with proper tools and equipment in doing his work as employee of defendant company. There was denial of negligence, with pleas of contributory negligence and assumption of risk on the part of plaintiff, etc. On issues submitted, the jury rendered the following verdict:

"1. Was the plaintiff injured by the negligence of the defendants, as alleged in the complaint? Answer: 'Yes.'

"2. Did the plaintiff contribute to his injury by his own negligence, as alleged in the answer? Answer: 'No.'

"3. Did the plaintiff assume the risk of his injury, as alleged in the answer? Answer: 'No.'

"4. What damages is the plaintiff entitled to recover of the defendant? Answer: '$6,000.' "

Judgment on the verdict for plaintiff and defendant appealed, assigning errors.

Morgan & Ward, W. R. Francis, and Smathers & Robinson for plaintiff.

Alley & Alley for defendant.

PER CURIAM. There was evidence on the part of plaintiff tending to show that in February, 1919, plaintiff, an employee of defendant company, was engaged in skidding logs from the woods to the company's "landing," this being done by hitching a team of horses to four or five logs, or more, at a time, coupled together, the double trees being hitched to iron grabs fastened in the foremost log, and leaving about six feet between this log and the horses. That the driver, who was on the ground, guided the horses by check lines, and there were supplied to plaintiff lines that were too short to enable plaintiff to walk on the side, but it was necessary for him to go between the log and the horses in order to do his work efficiently. That plaintiff had called this defect to the attention of the company's foreman and was told to go on; do the best he could with these lines, and they would have proper lines supplied. That on the occasion in question the logs were on a steep mountain side, and it had snowed some the night before, and in moving a trail of logs with his team they made some speed down the mountain, and in the endeavor to guide the horses, plaintiff was jerked before the log and his ankle mashed between that and a stump or root, causing serious, painful, and protracted injury, from which he still suffers, etc.

There was testimony for defendant on the issues, and in charging the jury on the principal issues of liability the court, among other things, said: "It is the duty of the defendant, the employer, to furnish the employee and his servant with a reasonably safe place to do his work, and a reasonably safe appliance with which to do it," etc. We do not find that this statement as to defendant's obligation and duty was in any way explained or essentially modified in other portions of his Honor's charge, and this being true, it must be held for reversible error, entitling defendant to a new trial.

In *Tritt v. Lumber Co.*, 183 N. C., 830, it was given as the established rule in this jurisdiction that the obligation to provide employees with a reasonably safe place to work and reasonably safe appliances with which to do it, is not absolute, but it is required that the employer must do this in the "exercise of ordinary care," and a charge that omits this as an element in the standard of duty will be held for reversible error.

The question was fully considered, and pertinent authorities examined and explained by *Associate Justice Adams* in the recent case of *Gaither v. Clement*, 183 N. C., 450, and it was there held, among other things: "That the duty of the employer to furnish his employee safe tools with which to perform his services, and a safe place to do so, depends upon the exercise by him of ordinary care in providing them, and an instruction that imposes upon the employer an absolute duty to furnish them, without qualification, leaving out the ordinary care required of him in their selection, is reversible error."

On the facts of the present record, we regard these authorities as decisive, and defendant will be awarded a

New trial.

STATE v. J. FRANK PHILLIPS.

(Filed 21 February, 1923.)

1. **Criminal Law—Fact That One Application for Certiorari Was Designated a Motion and Another a Petition Not Material.**

   Where two applications for *certiorari* to a county court to remove into the Supreme Court a judgment and proceedings by which the applicant was held to work on the roads for drunkenness were filed, the fact that one application was designated as a petition and the other as a motion was not material, since it related to the form and not the substance of the application.

2. **Criminal Law—Certiorari to Review Judgment That Accused Work Roads Not so Irregular as to Require Dismissal.**

   Where a judgment was that the accused should be required to work the roads for six months if again found drunk within the county, and that the clerk of the Superior Court and the sheriff should execute the sentence upon information that the accused was again drunk in the county, a proceeding by *certiorari* to review the judgment and proceedings thereunder by which the accused was held to work the roads, instead of appealing in the usual way, was irregular, but not enough so as to warrant a dismissal.

3. **Constitutional Law—Judgment Permitting Clerk of Court and Sheriff to Revoke Suspended Sentence Held Void.**

   Where accused was given a suspended sentence of work on roads for drunkenness, a provision that, if he became drunk again, the clerk of the court and the sheriff on information should put the sentence into execution was void, as a denial of due process of law, since the clerk and the sheriff had no judicial authority.

4. **Criminal Law—On Ordering Execution of Suspended Sentence, Hearing Should be Had by Court as to Violation of Conditions.**

   Where a defendant was given a suspended sentence of six months work on the roads for drunkenness on plea of guilty, an allegation by the State that the condition of suspending the sentence that defendant should not

become drunk in the county again was broken, and asking enforcement of the sentence, the judge should have required the defendant to appear for inquiry, and, on finding the allegation true, should have stated his finding in the record, and enforced the sentence or have taken such other course as his finding justified.

5. Criminal Law—Accused, Imprisoned Illegally for Violation of Condition of Suspended Sentence, Not to be Discharged.

Where a person was imprisoned illegally by action of the clerk of the court for violating a condition of a suspended sentence, in pursuance of such power granted the clerk in the sentence, he will not be discharged, but will be released on giving bond to appear for a hearing before the trial court as to whether the condition was violated.

6. Criminal Law—Sentence of Imprisonment in Excess of Legal Time Held Not to Entitle Prisoner to Discharge.

Where a prisoner was given a suspended sentence of six months work on the roads for drunkenness, and on violation of a condition that he should not get drunk in the county again was illegally imprisoned by the clerk of the court in pursuance of the suspended sentence, the fact that such sentence was contrary to Public-Local Laws 1913, ch. 775, as amended by Public-Local Laws 1917, ch. 663, restricting the penalty to a term of 60 days, does not entitle the prisoner to be discharged, but the case brought up on *certiorari* will be remanded so that he may be resentenced according to law.

7. Drunkards—Sentence of Imprisonment Exceeding Legal Limit Held Error.

Under Public-Local Laws 1913, ch. 775, as amended by Public-Local Laws 1917, ch. 663, making punishment for drunkenness in Yancey County 60 days work on the roads, a sentence of 6 months work on the roads for drunkenness was error.

Headnotes by MR. JUSTICE WALKER.

On docket of Fall Term, 1922.

This is a petition for a *certiorari* to bring into this Court the record in the above entitled case, which was tried before Hon. T. D. Bryson, judge presiding, wherein it appears that the defendant was sentenced to pay a fine of $50 and the costs for being publicly drunk upon his plea of guilty entered upon his arraignment.

The above judgment, or sentence, was changed by the court, Judge T. D. Bryson presiding, as appears in the petition of the defendant to this Court for a *certiorari,* which is in the main stated here as it shows the several steps taken in the cause leading up to the application now made before us for a *certiorari* in lieu of an appeal, and which petition is substantially as follows:

"The defendant in the above entitled cause hereby moves the honorable judges of the Supreme Court of North Carolina for writ of *certiorari* in lieu of appeal in this cause for the reasons that at the last October Term of the Superior Court of Yancey County the defendant plead

guilty to the charge of public drunkenness, whereupon his Honor, T. D. Bryson, judge, rendered judgment in effect that the defendant should be sent to the public roads of any county designated by the commissioners of said county for a term of six months if the defendant was again drunk in Yancey County, and designated the clerk of the Superior Court and sheriff of said county to put said execution into effect upon information that the defendant was again drunk in said county. That some time later the defendant was arrested upon a capias issued by said clerk and assigned to the public roads of Henderson County, where he is now working, and unlawfully detained in custody. The defendant sued out a writ of *habeas corpus*, which was heard before his Honor, J. Bis Ray, judge, on 8 January, 1923, when he was recommitted upon the hearing.

"In support of this motion, the defendant cites the Public-Local Laws of 1913, ch. 775, p. 1598, sec. 4, and Public-Local Laws of 1917, ch. 663, p. 774, which restricts the penalty of public drunkenness in Yancey County to a term of sixty days, and which his Honor, T. D. Bryson, exceeded by a term of four months. That the defendant was sentenced conditionally only, or rather the judgment was suspended upon the condition that the defendant pay the cost and remain sober, and that the clerk had no right, nor did his Honor have any right to designate the clerk, to cause the defendant to be arrested and committed directly to the public roads, without giving him a hearing as to whether he had violated the conditions of the judgment, and which the defendant denies he had violated. As to the authority of the clerk to commit the defendant, upon *ex parte* information and out of court, the prisoner cites *S. v. Burnette*, 173 N. C., 734; *S. v. Hardin*, 183 N. C., 815 (*S. c.*, 12 S. E. Reporter, 593).

"That no appeal is provided by the laws of North Carolina from a judgment upon a writ of *habeas corpus*, and that the only proceeding available to the defendant is by application, or motion, for a writ of *certiorari* to have reviewed the record and the judgment rendered by his Honor, Judge Bryson. *S. v. Herndon*, 107 N. C., 934; *In re Holley*, *supra*.

"Wherefore, the defendant makes this motion for a writ of *certiorari*."

It seems that a second petition was filed by defendant for the writ of *certiorari* (perhaps one being an amendment of the other), which is substantially as follows:

To the Honorable Justices of the Supreme Court of the State of North Carolina:

Your petitioner, J. Frank Phillips, respectfully showeth:

1. That the defendant was indicted in the Superior Court of Yancey

County, charged with public drunkenness, and plead guilty thereto at the October Term of said court, 1922.

2. That his Honor, T. D. Bryson, rendered judgment against the defendant as follows:

"*State v. J. Frank Phillips:* In this cause the defendant pleads guilty and was fined $50 and the cost of this action. And it appearing to the court that the defendant was intoxicated all this term of court, it is now ordered the judgment be stricken out and the following judgment rendered against the defendant:

"It is ordered and adjudged by the court that the defendant be confined to the county jail of Yancey County for a term of six months, to be assigned to work upon the public roads of any county in the State that the county commissioners may assign him to, on condition that if said Phillips gets drunk again in Yancey County it shall be the duty of the clerk of the Superior Court or the sheriff of this county, upon information that defendant has been drunk, to execute capias and put this judgment into effect.

"Defendant to be discharged upon payment of the cost."

3. That on 2 December, 1922, the clerk of the Superior Court of Yancey County issued a capias for the defendant upon which the sheriff of Yancey County has arrested the defendant, and now has him in the common jail of Yancey County pending negotiations between the commissioners of Yancey County and Henderson County to the end of assigning him to the roads of that county.

4. That your petitioner procured a writ of *habeas corpus* issued by his Honor, J. Bis Ray, on 3 January, 1923, which was heard before him on 8 January, 1923, when his Honor dismissed the *habeas corpus* and remanded the defendant to prison under the said judgment of his Honor, T. D. Bryson.

5. That affiant denies that he had violated the conditions of the judgment of Judge Bryson, and contends that he has a right to be heard in open court thereon, and that the clerk of the Superior Court does not have jurisdiction to assign him to jail arbitrarily without such hearing; that the judgment of his Honor, T. D. Bryson, is illegal in that he had no legal authority to sentence the defendant for a longer term than sixty days under the public-local statutes applying to Yancey County.

6. Your petitioner further shows that he has lost his right to appeal from the original indictment and trial on the merits by his acquiescence in the suspension of the judgment, and that unless your Honors will issue a writ of *certiorari* for the *habeas corpus* proceedings to be reviewed by your Court that he will suffer great wrong by being forced to serve an excessive term of imprisonment without hearing, and contrary to the law and Constitution of the State.

Your petitioner therefore prays your Honors to grant him a writ of *certiorari* directed to the clerk of the Superior Court of Yancey County, and to the other officers of said court, to remove the said judgment and proceedings into the Supreme Court of North Carolina; also that a *supersedeas* writ be issued directed to the sheriff of Yancey County commanding him to desist from all further proceedings in the case, and directing him to release the defendant on bail, to be fixed by your Honors and approved by the clerk of the Superior Court of Yancey County.

These petitions were properly verified.

R. W. Wilson for petitioner.

WALKER, J., after stating the facts: It may be well to state that there is a little confusion in the record as to the exact nature of the application to this Court, on being designated as a petition and the other as a motion; but this is not very material, as it affects only the form and not the substance of the application.

The board of county commissioners designated Henderson as the county in which the defendant should work under the sentence of the court, and he is now performing his work there.

This proceeding for a *certiorari*, instead of an appeal in the usual way and by the ordinary method, is somewhat irregular, but not enough so to warrant a dismissal. Besides, the Attorney-General has made no such motion, and very properly so. We will, therefore, consider the case and decide it on its merits. We are thus following the course indicated in the case of *In re Holley*, 154 N. C., 163, which was similar in its facts, or, at least, sufficiently so to make it a reliable precedent. It was there held:

"1. Except in cases concerning the care and custody of children, there is no appeal from a judgment in *habeas corpus* proceedings. Rev., sec. 1854.

"2. In *habeas corpus* proceedings wherein upon the hearing are involved questions of law or legal inference, and judgment is a denial of a legal right, it may be reviewed by the Supreme Court by virtue of the Constitution, Art. IV, sec. 8, under the power given to this Court 'to issue any remedial writs necessary to give it general supervision and control over the proceedings of inferior courts.'

"3. The remedy given under the constitutional power conferred upon the Supreme Court to review a judgment in *habeas corpus* proceedings in matters not involving the care and custody of children, Constitution, Art. IV, sec. 8, shall only be exercised by *certiorari*, and the jurisdiction cannot be acquired by appeal upon exception and error assigned.

"4. In *habeas corpus* proceedings, where it appears from the application for *certiorari* in the Supreme Court, or the documents annexed thereto, that the petitioner is detained under a final judgment of a competent tribunal, the writ will be denied in the Supreme Court; and when such fact is disclosed on the hearing, the petitioner must be remanded. Rev., secs. 1822 (2); 1827, 1848 (2).

"5. The term 'final judgment or decree of a competent tribunal' wherein the Supreme Court will not issue a *certiorari* to review a judgment entered in *habeas corpus* proceedings, refers only to judgments authorized by the law applicable to the case in hand; and when it appears from an inspection of the record proper and the judgment itself that the court had no jurisdiction of the same, and was manifestly without power to enter the judgment or to impose the sentence in question, there is no final sentence of a competent tribunal.

"6. The term 'competent tribunal' used by the Revisal, sec. 1822, in making an exception to the power of this Court to review a judgment in *habeas corpus* proceedings, means that where a committed criminal is detained under a sentence not authorized by law, he is entitled to be heard, and where, though authorized in kind, it extends beyond what the law expressly permits, he may be relieved from further punishment after serving the lawful portion of the sentence; and a different construction would render the statute unconstitutional." See, also, *S. v. Green,* 85 N. C., 600.

The court proceeded not only irregularly, but its action in sentencing the defendant to six months at hard labor on the public roads in a county to be designated by the county commissioners was without any warrant in law. The Constitution of our State and every acknowledged principle of the common law, and of justice and right, allow a defendant to be heard by the proper tribunal before he is condemned or punished. No one will now deny, or even question, so plain and conceded a rule of the law as established and enforced from the earliest and most ancient period to the present time. The defendant in this case pleaded guilty, which justified a sentence of imprisonment at hard labor on the roads. This was not what was done, but it was left to the judgment of a non-judicial person to determine whether he had violated the terms and conditions of the suspended judgment by his insobriety, and, if found by the clerk of the court or the sheriff that he had done so, he should be sent to the roads of any county designated by the county commissioners, to be assigned to hard labor for the term of his imprisonment. It is perfectly plain, and even palpable, that such a sentence is void, being in contravention of the prisoner's constitutional rights. It is undoubtedly true that the public welfare or "the good of the whole" is paramount, but experience has brought men to see the truth that the public

welfare is preserved only when limitations are placed upon the government and those who make, declare, and execute the law. The public welfare demands the punishment of crime as a means of prevention, but the same public welfare demands that trial by due process of law and conviction shall precede punishment. When such limitations are not imposed, it is found that "the grim tradition" is true:

> "I oft have heard of Lydford law,
> How in the morn they hang and draw,
> And sit in judgment after."

"We cannot assent to the validity of any legislative or judicial act depriving the citizen of his life, liberty, or property which will not stand the test of the standard fixed by the Constitution." *Daniels v. Homer*, 139 N. C., 239. It was not the deliberate judgment of "An upright judge, a learned judge," which the law requires before punishment is inflicted. Neither the clerk of the court nor the sheriff is invested by law with any such power. Neither of them is endowed by law with any such jurisdiction, and no citation of authority is needed to establish so plain a proposition.

If the defendant was sentenced upon his plea of guilty, and the judgment was suspended, or its immediate execution withheld, on a condition, and the State alleged a violation of that condition, and asked for the enforcement of the sentence, because of the violation of the condition upon which it was based, the judge should have required the defendant to appear before him, by notice or by capias, if necessary, and inquired into the allegation of the State, and, if found to be true by him, he should have enforced the judgment or taken such other course as his finding may have justified. But he clearly had no power or jurisdiction to leave this important and essential judicial prerequisite to be ascertained or found by a clerk of the court, or a sheriff, and thereupon to order the imprisonment of the defendant with hard labor upon the roads of any designated county. Such a course is abhorrent to our notion of the rights and liberties of freemen. It goes without saying that there should be no feeling or prejudice, or other motive, in sentencing a defendant who has committed a violation of one law, more than there is where he has offended against some other law, but only a calm and dispassionate judgment upon the facts of the case, without regard to the particular nature of the crime committed. Crimes of no kind should be punished by passion or prejudice, and there has been none such here. We are absolutely sure that such is the case. The Great Judge of all men looks with compassion upon His creatures and con-

siders them in mercy. We are told in beautiful and impressive form, when Antonio confessed the bond he gave, and Portia addressed Shylock:

"ANTONIO: Ay, so he says.
"PORTIA: Do you confess the bond?
"ANTONIO: I do.
"PORTIO: Then must the Jew be merciful.
"SHYLOCK: On what complaint must I? Tell me that.
"PORTIA: The quality of mercy is not strain'd,
It droppeth as the gentle rain from heaven
Upon the place beneath. It is twice blest:
It blesseth him that gives and him that takes.
'T is mightiest in the mightiest; it becomes
The throned monarch better than his crown;
His sceptre shows the force of temporal power,
The attribute to awe and majesty,
Wherein doth set the dread and fear of kings;
But mercy is above this sceptred sway,
It is enthroned in the hearts of kings,
It is an attribute to God Himself;
And earthly power doth then show likest God's,
When mercy seasons justice. Therefore, Jew,
Though justice be thy plea, consider this,
That in the course of justice none of us
Should see salvation; we do pray for mercy;
And that same prayer doth teach us all to render
The deeds of mercy."

We pause to remark that the prisoner has no ground whatsoever upon which to complain in this proceeding that the law was not administered fairly and impartially in his behalf, for it was, in every respect, though it may have been erroneously conceived and applied. He had the full benefit of decisions of two of our ablest judges, men not only of ability, but of great judicial learning, and incapable of being otherwise than perfectly fair, and who always consider and decide, as Edmund Burke once said, with "The cold neutrality of the impartial judge."

We may also observe that the judgment appears to be not so much a suspended one, as a conditional judgment, which is forbidden; but for the sake of further argument, we may assume and treat it as a suspended judgment.

But that is not the serious question before us, because this is what we must decide, and do decide. The clerk or sheriff had no judicial power to pass upon the question, as to the guilt of a defendant or his liability to punishment, which resides alone in the court, generally with the aid of a jury, but not so in this instance. The judge should have ascertained whether the allegation of the State that the prisoner had violated the condition on which the judgment was suspended, or its immediate execution withheld, had been shown, and his finding should be stated in the

record. If he decided upon competent evidence that it had been so violated, he should then have proceeded to impose such punishment as in his sound discretion the circumstances of the case and the law required. Proceeding otherwise, and as he did, was contrary to law, and he was without jurisdiction so to act, and the defendant consequently is held illegally and entitled to be released from custody, but only on giving bond, or recognizance, for his appearance at the next term of the court, when and where the case can be properly heard and judgment entered according to approved practice and procedure of the courts.

These principles of the law, as applicable to the facts of this case, will be found stated and settled in the following decisions: *S. v. Hardin*, 183 N. C., 815; *S. v. Burnette*, 173 N. C., 734; *S. v. Vickers*, 184 N. C., 676 (114 S. E., 168). In the *Vickers case*, *supra*, substantially the same order was entered by the court as we find in this record, but the prisoner being present in court, we held that the judge properly remanded him to the custody of the sheriff in order that he should receive the punishment imposed upon him under the former judgment of the court.

This defendant has not been legally sentenced, though we will not discharge him, but instead will require that he give a bond, or recognizance, in the sum of $200 for his appearance at the next term of the Superior Court of Yancey County, to have and receive such punishment for his offense as the judge may impose and as the law allows. The judge will find the facts and decide accordingly.

We express the hope that the judges will be more careful in acting upon suspended judgments and follow the practice and procedure so often approved by this Court.

Writ of *certiorari* granted and judgment is reversed upon the record as it now appears. The prisoner will be at once released on giving a justified bond as required, before the clerk of the Superior Court of Yancey County, and his custodian will comply with this order.

The contention of the prisoner that he is entitled to be discharged because the judge exceeded the limit of punishment authorized by law, that is, sixty days imprisonment, cannot be taken at this time, as he has not even undergone punishment for that period of time.

Where the Superior Court has imposed a punishment which exceeds the limit fixed by the law, the prisoner is not entitled to be discharged because of it, but the case will be remanded so that he may be brought before the court and resentenced according to law, as was done in *S. v. Battle*, 130 N. C., 655. In this case the statute prescribes a punishment of not exceeding sixty days imprisonment, and the court erred in exceeding that limit. Public-Local Laws of 1913, ch. 775, as amended by Public-Local Laws of 1917, ch. 665, which is confined in its operation to Yancey County.

We held in *S. v. Burnette,* 173 N. C., 734:

"3. A trial justice, under the statute, is but the presiding officer of his court, and where the court has suspended judgment against the prisoner upon condition that he report to the court from time to time and show his good behavior, he may not thereafter cause the defendant to be imprisoned or sent to the roads for violating the conditions imposed, except in open court regularly sitting for the transaction of business, and the court must afford him opportunity to be heard, and to employ counsel, if he so desires; and the proceeding held privately in the office of the justice wherein he attempts to order the execution of the judgment, is without warrant of law and of no effect.

"4. The rule that the proceedings of a court of competent jurisdiction are not reviewable in *habeas corpus* proceedings does not apply when it appears that the justice before whom the case had been determined had convicted the applicant of violating the prohibition law, suspended judgment upon condition of good behavior, and ordered the execution of the sentence and the arrest of the defendant in proceedings privately had in his office, and not in open court, as the law requires.

"5. It appearing in this case that the trial court suspended judgment in a criminal action upon certain conditions, without adjudication of the fact whether the defendant had complied therewith, and had ordered the execution of the sentence and the arrest of defendant without warrant of law, *it is held* that the defendant give a bond in a certain sum for his appearance before the criminal court at a time to be fixed by it, giving him reasonable opportunity to be heard, employ counsel, etc., and in default of his giving the bond, the court to issue a warrant or capias for the purpose of investigation."

And in *S. v. Hardin, supra,* it was held:

"1. It is within the power of the court having jurisdiction of a criminal action to suspend judgment on verdicts of conviction for determinate periods and for a reasonable length of time, conditioned on good behavior, and the court so acting may in its sound discretion conclusively determine from time to time whether the conditions have been violated, except where the instance being inquired into has been determined for the defendant by the jury, or other competent tribunal having jurisdiction of the criminal offense which is the sole basis of the present inquiry, in which event the result of the former action will be controlling.

"2. Where the court, within the proper exercise of its authority, has suspended judgment upon conviction of the defendant in a criminal action, the term 'good behavior' signifies that his conduct will be such as the law authorizes, in contradistinction to bad behavior, punishable by the law.

"3. In order for the court having jurisdiction to impose a valid sentence upon a suspended judgment in a criminal action, it must be properly established by pertinent testimony that the conditions upon which the judgment had been suspended had been broken by the defendant.

"5. The findings of the trial judge on imposing a sentence under a suspended judgment in a criminal action are insufficient where they only permit the inference of a breach of the condition, and do not find the ultimate fact of guilt in infringing the criminal laws of the State.

"6. The judge of the Superior Court having jurisdiction is not concluded in determining whether the defendant has broken the condition annexed to a suspended judgment, and passing sentence thereunder, by a judgment of a recorder's court not having jurisdiction, acquitting the defendant of the offense under investigation.

"7. The XVIII Amendment to the Constitution of the United States, and the Volstead Act designed to make it effective, do not condemn or make unlawful the manufacture of liquor for certain specified purposes, or under certain conditions, and a finding of the judge of the Superior Court that the defendant, under a suspended judgment, had manufactured large quantities of wine is not sufficient upon which he may pass the sentence, for condition broken, the ultimate fact of guilt not having been found by him. *S. v. Yates*, 183 N. C., 753, concerning the exercise of the pardoning power vested by our Constitution in the Governor, cited and distinguished.

"8. The State courts have no jurisdiction over offenses arising exclusively under the XVIII Amendment to the Constitution of the United States, and the Volstead Act passed for its enforcement; and where the State court has suspended judgment against the defendant conditioned on his good behavior, this, without more, should be considered only in connection with the State statutes on the subject of prohibition, that our courts have jurisdiction alone to enforce, and not with reference to the Federal law on the subject.

"9. A sentence imposed under a suspended judgment in a criminal action upon condition of good behavior broken is not objectionable as double punishment for the same offense, by reason of the fact that the defendant had performed his agreement to reimburse the private prosecutors for money they paid in attorneys' fees in the action.

"10. Where the Supreme Court has reversed the action of the Superior Court judge in imposing a sentence under a suspended judgment in a criminal action, for an insufficiency of finding as to the defendant's ultimate guilt, the judgment will be set aside and the cause remanded to be proceeded with according to law."

Those cases are quite sufficient as authority for the action which we direct to be taken in this prosecution.

This opinion and decision will be certified down at once, and the solicitor of the district and Mr. Alley, prisoner's counsel, promptly notified of it by the clerk of the court.

Reversed.

STATE v. BUTLER.

(Filed 21 February, 1923.)

1. Criminal Law—Excluding Evidence of Statement of Victim's Wife, Alleged as Made on Recognition of Husband's Knife, Held Not Error.

In a prosecution for assault with a deadly weapon, where defendant claimed that, at the time he struck prosecuting witness with a pick-handle, he was acting in self-defense, witness having a knife in his hand and advancing on him, the State's evidence tended to show that witness had no knife, there was no error in refusing to admit evidence that at some time after the assault wife of witness, when handed a knife, exclaimed, "Lord, that is Herbert's knife" (witness's name being Herbert), where an appreciable time had elapsed after the assault before the remark was made, and it was not part of the *res gestæ*, nor did the evidence show clearly that witness heard the remark.

2. Criminal Law—A Charge is to be Taken as a Whole.

A charge is to be taken as a whole, and not broken up into disconnected and desultory fragments, and thus considered.

3. Criminal Law—Charge to be Considered as a Whole.

In a prosecution for assault with a deadly weapon, where defendant claimed he acted in self-defense, prosecuting witness having a knife in his hand and advancing on him, where the inference from the charges were that the jury should first inquire whether the assault was made in self-defense or whether unlawfully and wrongfully, and if they found that it was made in self-defense, to acquit, but, if not, they should further inquire as to whether defendant had committed an assault with intent to kill, an instruction that if they found that defendant assaulted witness with a deadly weapon, and that he did so without intent to kill, to return a verdict simply of guilty of an assault with a deadly weapon, and not of one with an intent to kill, was not intended to be segregated from the rest of the charge, and was not misleading.

Headnotes by MR. JUSTICE WALKER.

APPEAL by defendant from *Calvert, J.*, at July-August Term, 1922, of TRANSYLVANIA.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Welch Galloway for defendant.

WALKER, J. The defendant was tried and convicted of an assault with a deadly weapon, and from the judgment upon such conviction appealed to this Court. Application was made at the last term for a *certiorari*, the *certiorari* was issued, and the hearing of the appeal was set at the end of the call of the docket for the Second District at this term.

It seems that there was ample evidence to sustain the verdict of the jury to the effect that the defendant was guilty of an assault with a deadly weapon, of which he was convicted. The defendant claimed that at the time he struck the prosecuting witness with a pick-handle, he was acting in self-defense, the prosecuting witness having in his hand a knife, and not only advancing on him with it, but that he struck him in such way as to cut his clothes. The State's evidence tended to show that the prosecuting witness, Bumgardner, had no knife, and that the assault by the defendant was in consequence of a quarrel in which Bumgardner cursed him.

Defendant's first exception was taken to the refusal of the court to admit evidence that at some time after the assault the wife of Bumgardner, when handed a knife, exclaimed, "Lord, that is Herbert's knife." The prosecuting witness's name was Herbert Bumgardner. It appears nowhere in the record that Bumgardner was being tried for any criminal offense himself. It does appear, or rather there was some evidence, that Bumgardner was nearby at the time of this remark of his wife. It also appears that an appreciable time had elapsed after the assault and before the remark was made, and, consequently, it was not part of the *res gestæ* as would be the involuntary or spontaneous exclamation of a bystander, at the very time of the transaction, within the principle of *S. v. Carraway*, 181 N. C., 561, and the cases there cited. This principle was strikingly illustrated by the tumultuous cries of the mob, during the Lord George Gordon riots in London, while on the way to Parliament, which were admitted as evidence against the rioters to show their motive or object. It is true that a witness may testify to a conversation between husband and wife, on a trial of the former for a criminal offense, tending to incriminate him or contradict him, if a witness, and occurring in the presence and hearing of the witness, and may contradict either of them as a witness in a cause by what one has said to the other, or, perhaps, by their conduct toward each other when relevant. *S. v. Randall*, 170 N. C., 757; *S. v. McKinne*, 175 N. C., 784, and *S. v. Martin*, 182 N. C., at 850, but that is not precisely this case. The situation and circumstances were not such, perhaps, as to prohibit the wife's remark from being used as evidence against her husband. C. S., 1802. See *S. v. Mooney*, 64 N. C., 54; *Toole v. Toole*, 109 N. C., 615. But the point here is that it did not reasonably appear that the husband either

heard what was said by his wife to another person, or, if he did, that he comprehended it, or was at all aware of its probable effect upon him. His attention was evidently distracted by the wound inflicted upon him by the prisoner.

It was said in the *Toole case, supra:* "The question which the court declined to allow the witness Pemberton to answer on the cross-examination, by implication sufficiently suggested the nature and purpose of the evidence it was intended to elicit. It was expected that this witness would state, in substance, that the plaintiff had forbidden his wife, before the time specified, to go or associate with the person named, or to go where he was. The evidence of other witnesses went to show that the plaintiff had reason to suspect that his wife and the person named were unduly intimate. We think that such evidence was relevant and competent. It tended, in some measure, to contradict the witness, Laura Toole. It is not probable that the plaintiff would have the man, whom he had reason to suspect was too intimate with his wife, to work for him, and that he invited that man to his house and to stay there with his children."

So that here the evidence of the witness Barton was competent for the purpose of contradicting the witness Bumgardner, as to his statement when on the stand, that he did not have a knife, provided his wife's statement was made in his presence, and in his hearing in such a way that he understood what was meant by what was said.

Underhill, in his treatise on Criminal Evidence, at pp. 153 and 154, sec. 122, says: "The silence of the accused as regards statements in his hearing which implicate him directly or indirectly may be proved with the statements, and from his acquiescence the jury may infer his guilt. Silence is assent as well as consent, and may, where a direct and specific accusation of crime is made, be regarded under some circumstances as a *quasi*-confession. . . . For silence to be equivalent to a confession, it must be shown that the accused heard and understood the specific charge against him, and that he heard it under circumstances not only permitting but calling for a denial, taking into consideration the circumstances and the persons who were present." And again at p. 298, sec. 242: "A witness may be impeached, not only by his contradictory or inconsistent statements, but also by proof that on a former occasion, under circumstances where it was his duty to state the whole truth, he omitted to state material and relevant facts which he now states. Thus, it may be proved that a witness omitted to state facts at the preliminary examination which he testifies to on the trial. But, for his silence to be admissible, it must appear from all the circumstances that it was his duty to tell the whole truth. The witness must be permitted to explain his previous ignorance of facts or his silence, and to show that his forget-

fulness or ignorance was real and not assumed." And still again, at p. 157, sec. 124: "A witness may testify that the declaration was made in the presence of the accused. He will not be permitted, however, to state his opinion that the accused must have heard it, for that is not for the witness to determine. The cases are not harmonious upon the mode of proving that the accused heard and understood the declaration, or whether the court or jury are to determine these facts. On the one hand it is affirmed that the facts that he heard and understood may be inferred by the jury from evidence that the statement was made in his physical presence, or from his nearness and attitude as a listener. On the other, it is held that this is not enough, and that affirmative evidence is required to show prima facie to the satisfaction of the court that the attention of the accused was attracted, and that he did actually and distinctly hear and understand, before the statement shall be permitted to go to the jury as his admission. If it appears indubitably that the accused was asleep, or was unconscious from intoxication or otherwise, so that he could not hear or understand, his silence is not competent."

This doctrine, which is substantially embodied in the maxim *Qui tacet consentire videtur,* was fully considered and discussed in *S. v. Jackson,* 150 N. C., 831, and the following, taken from the syllabus, is fairly to be drawn from the case:

"1. The silence of a party as an admission of statements made in his presence is to be received in evidence with great caution, and except under well recognized conditions, is altogether inadmissible.

"2. The silence of a person present at a judicial or *quasi*-judicial investigation, when statements are made by a witness, is no evidence of his admission of the truth of the statements, unless he was afforded fair opportunity to speak.

"3. Defendant had sworn out a warrant before a justice of the peace against S., and gave testimony upon the trial that S. had unlawfully stolen a ballot, pending a municipal election. Said S. was bound over to court, but no true bill found by the grand jury. Upon the trial of defendant for perjury, by reason of the oath and testimony, a State's witness was permitted to testify, over defendant's objection, that defendant was present, pending a hearing or investigation had before the county commissioners concerning this election, and said nothing at that time about S. having taken the ballot: *Held,* error."

This Court, in the *Jackson case, supra,* in the opinion of *Justice Hoke,* relies largely on Chamberlayne on Evidence, vol. 2, pp. 523 to 555, but also cites many decisions of this and other states, and among them *Francis v. Edwards,* 77 N. C., 271; *Tobacco Co. v. McElwee,* 96 N. C., 71; and, also, *Comrs. v. Brown,* 131 Mass., 69, where it is said: "A statement, made in the presence of a defendant, to which no reply is

made, is not admissible against him unless it appears that he was at liberty to make a reply, and that the statement was made by such person and under such circumstances as naturally to call for a reply, unless he intends to admit it; but if he makes a reply, wholly or partially admitting the truth of the facts stated, both the statement and the reply are competent evidence," citing *Comrs. v. Kennedy,* 12 Metcalf (Mass.), 235.

We must consider that in the present case it appears that Bumgardner, the State's witness, was at the time the remark was made by his wife badly wounded and suffering from its effects, and it does not appear that he actually heard the remark made by his wife, and the fair inference is that he did not. There was sufficient evidence before the judge for his exclusion of the question, upon the ground that the prisoner had not even made out a prima facie case for its admission as evidence, the burden being upon him to show its admissibility. Where a prima facie case is shown, and the evidence ruled in as an admission by silence, it would be competent for the prisoner, or other person affected by it, to show afterwards that the statement was not heard, or that it could not be heard, and if it was, or could have been, that owing to the condition of the person of whom it was spoken, or for some other reason, it was not understood, or could not have been, or that its significance was not apparent to him. This evidence being competent for that his silence under such circumstances would not be, or should not be, the equivalent of an admission, and the authorities above cited, and others, are to that effect.

But the difficulty we encounter in this case arises from the peculiarity, and even the uniqueness, of its facts and circumstances, as it bears no striking, or even close, resemblance to any other. The remark attributed by the witness Barton to Herbert Bumgardner's wife appears not to have been made under conditions and circumstances which indicated that Bumgardner himself heard it, or was even in a situation, with respect to her at the time, to hear it; and further, the evidence tends most strongly to show that he neither heard it, or, if he did, that he was not physically and mentally competent to understand it or realize its importance or relevancy to him, so as to call upon him to deny it or to speak at all. The testimony in regard to this phase of the case is of such an unreliable nature, or so incapable of either being called proof or considered as such, that we would not be justified in allowing it to be considered. It is more than likely, and indeed very probable, that it was not heard by her husband, but was uttered in a very low and inaudible tone of voice, although called an exclamation. The defendant should have offered some reliable or probative evidence that it was heard, or, at least, that it could have been, and there is no sufficient proof, we must hold, either

way. *Lanergan v. The People*, 39 N. Y., 39. We must therefore overrule this exception, as the evidence is not at all satisfactory as to the tone of voice in which the remark was uttered.

The only other exception of the defendant was to that portion of the court's charge, which is as follows: "If you find from the evidence, and beyond a reasonable doubt, that the defendant assaulted Bumgardner with a deadly weapon, and that he did so without intent to kill, then you should return a verdict of guilty of an assault with a deadly weapon."

If this had been the only charge of the judge contained in the record, it would (in the light of the fact that the defendant relied on self-defense) have been erroneous. It is, however, familiar law, constantly administered by us, that a judge's charge in the court below is to be taken as a whole, and not broken up into disconnected and desultory fragments. Judge Calvert in this case was particular in the first part of his charge, to state the law of self-defense as applicable to the facts of the case. After doing this, he states first the contentions of the State and then, in full, the contentions of the defendant, in which he submitted to the jury every point which might bear in his favor. After doing this, he warns the jury that it was for them to determine the case upon the weight of the testimony, and as to whether or not they were convinced beyond a reasonable doubt that the defendant unlawfully assaulted the prosecuting witness with a deadly weapon. Construed in this way, it appears that the jury could not have been misled by the charge.

It must be borne in mind that the extract from the charge given above was not by any means all that the judge said, even in that immediate connection, because in juxtaposition with the clause quoted from his instructions to the jury, the learned judge further said, after stating the contentions of the respective parties and charging sufficiently upon the law of self-defense as applicable to the special facts of the case, and charged the jury as follows: "So, having all the facts and circumstances in the case, if you find from the evidence and beyond a reasonable doubt that the defendant assaulted Bumgardner with a deadly weapon, and with intent to kill, then you should return a verdict of guilty as charged in the bill of indictment; or if you find from the evidence and beyond a reasonable doubt, that is, if you should find the facts—I will go back and say that if you find from the evidence and beyond a reasonable doubt, that the defendant assaulted Bumgardner with a deadly weapon, and with intent to kill, then you should return a verdict of guilty as charged in the bill of indictment. If you find from the evidence, and beyond a reasonable doubt, that the defendant assaulted Bumgardner with a deadly weapon, and that he did so without intent to kill, then you should return a verdict of guilty only of an assault with a deadly weapon."

We do not consider it possible that an intelligent jury could have understood from the entire charge that his Honor intended to segregate the quoted instruction, or any part of it, from what went before in his charge, but that the inference was clear that the jury should consider all of the instructions, and all of his charge, his intention being, and being clearly expressed, that the jury should first inquire whether the assault of the defendant was made in self-defense or whether unlawfully and wrongfully, that is, without excuse. If they found that it was made in self-defense, they should acquit the prisoner, but if it was not, they should proceed further to inquire whether the prisoner had committed an assault with a deadly weapon with intent to kill, and if so they would find him guilty accordingly, or if they found that he committed an assault with a deadly weapon without the intent to kill, they would find him guilty only of an assault with a deadly weapon.

We do not think that the court unduly emphasized the contention of the State, but that, on the contrary, he presented the case fully, fairly, and impartially to the jury, and that "he stated in a plain and correct manner the evidence given in the case and declared and explained the law arising thereon," as required to do by the statute.

We conclude that there is disclosed in the record no error, and, therefore, affirm the judgment.

No error.

STATE v. BUD BRAME.

(Filed 28 February, 1923.)

1. Intoxicating Liquors—Spirituous Liquors—Criminal Law—Verdict—Issues—Counts in Indictment—Responsiveness of Verdict.

Where the defendant is tried for violating our prohibition law, and indicted under the provisions of C. S., 3379, with possession of spirituous liquor for purposes of sale; section 3385, with receiving more than a designated quantity; section 3386, with receiving such liquor more than one quart at a time within fifteen consecutive days; section 3384, with shipping and transporting the same, a verdict upon the evidence "that the defendant is guilty of receiving more liquor than allowed by law, and not guilty of receiving and transporting liquor," is a finding of guilty of violating the provisions of C. S., 3385; and defendant's motion to set aside the verdict as unresponsive to the issues or the counts set out in the bill of indictment, is properly denied.

2. Intoxicating Liquor — Spirituous Liquor—Courts—Jurisdiction—Federal Statutes—State Statutes—Conflict of Laws.

C. S., 3385, is to prohibit the receiving of more than specified quantities of spirituous or malt liquors, and is an aid to the enforcement of the Volstead Act, passed in pursuance of the Eighteenth Amendment to the

Constitution of the United States; and the Federal amendment giving concurrent jurisdiction to the Federal and state courts in the enforcement of the prohibition law, does not take from that of the state court the enforcement of a state statute on the subject not in conflict with the Federal statute, whether the state statute was passed before or after the amendment to the Federal Constitution.

APPEAL by defendant from *Horton, J.*, at October Term, 1922, of VANCE.

Criminal prosecution, tried upon an indictment charging the defendant with having or keeping in his possession, for the purpose of sale, certain spirituous liquors (C. S., 3379), and with receiving, at one time or in one package, certain spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart (C. S., 3385), and further, with receiving certain spirituous or vinous liquors or intoxicating bitters in a quantity or quantities totaling more than one quart during the space of fifteen consecutive days (C. S., 3386), and with shipping and transporting the same in violation of C. S., 3384.

The following is the form of the verdict as recorded:

"The jury come into court and say for their verdict that the defendant is guilty of receiving more liquor than allowed by law, and not guilty of retailing or transporting liquor."

From a judgment of eight months on the roads, the defendant appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

R. S. McCoin, Kittrell & Kittrell, and Murray Allen for defendant.

STACY, J. The defendant excepts to the form of the verdict upon the ground that it is not responsive to the issues submitted to the jury, or to the counts contained in the bill of indictment. By correct intendment and interpretation, viewing the trial in its entirety, as disclosed by the record, we think it is clear that the verdict rendered amounts to a conviction of the defendant of having violated the following provisions of C. S., 3385: "It is unlawful for any person, firm, or corporation at any one time, or in any one package, to receive at a point within the State of North Carolina for his use, or for the use of any person, firm, or corporation, or for any other purpose, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons." *S. v. Parker*, 152 N. C., 790 ("guilty of carrying a concealed weapon in a suitcase"); *S. v. Whitaker*, 89 N. C., 472 ("guilty of receiving stolen cotton"), and

S. v. Hudson, 74 N. C., 246 ("guilty of shooting"), all presenting verdicts which were held to be insufficient, are not in conflict with this position. *S. v. Lemons,* 182 N. C., 828; *S. v. Godwin,* 138 N. C., 585, and cases there cited.

But it is contended by the defendant that since the adoption of the Eighteenth Amendment to the Constitution of the United States, and the enactment by Congress of 41 U. S. Statutes at Large, 305, known as the Volstead Act, this section of our prohibition law has been superseded and is no longer of any force or effect; because, it is alleged, the statute in question undertakes to authorize or to sanction, in a measure, at least, what the Federal laws prohibit. *Rhode Island v. Palmer,* 253 U. S., 350; *S. v. Green,* 148 La., 376. The prosecution, on the other hand, contends that this section of our law is constitutional and valid except the last eighteen words of the statute, and that with these words, or all after the words "intoxicating bitters," omitted or stricken out, the section should be upheld as a valid enactment of our Legislature. The following from the National Prohibition Cases, 253 U. S., 350, is cited as authority for this position: "The first section of the Eighteenth Amendment—the one embodying the prohibition—is operative throughout the entire territorial limits of the United States, binds all legislative bodies, courts, public officers, and individuals within those limits, and of its own force invalidates every legislative act—whether by Congress, by a state legislature, or by a territorial assembly—which authorizes or sanctions what the section prohibits."

We can accept neither contention, though cogent and plausible arguments have been advanced in favor of each position. As said by the late *Justice Allen,* in *S. v. Helms,* 181 N. C., 570: "It would be a strange application of law to hold that a defendant, being tried in the State courts for violating a statute of the State, could be convicted because he had violated a Federal statute, or that giving to the Volstead Act the effect of striking down all provisions of state statutes in conflict with its terms it should have further operation to render a citizen of the State indictable under a State statute, which has had a material part stricken out without the consent of the General Assembly, and which as thus changed has never had the approval of the General Assembly." To like effect is the decision in *S. v. Barksdale,* 181 N. C., 627.

The main purpose of this section, C. S., 3385, is not to authorize or to sanction the receipt of any spirituous or vinous liquors or intoxicating bitters in a quantity of one quart or less, or any malt liquors in a quantity of five gallons or less, but its chief purpose and primary object is to prohibit the receipt, by any person, firm, or corporation, at any one time or in any one package, *for any purpose,* of any spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or

any malt liquors in a quantity greater than five gallons. The section, therefore, is primarily a prohibitory law, and its prohibitory features are in aid of the enforcement of the Eighteenth Amendment, and not in conflict with it. The statute now under consideration deals with the *receipt* of spirituous or vinous liquors or intoxicating bitters, while the Eighteenth Amendment only prohibits the "manufacture, sale, or transportation of intoxicating liquors." The restrictions against receiving more than a given quantity, at any one time or in any one package, are better than no restrictions at all against receiving it, at least such is in favor of making prohibition more effective. To condemn and to make unlawful every receipt of spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or any malt liquors in a quantity greater than five gallons, may also aid, as it certainly will, in preventing sales of liquor, containing as much as one-half of one per cent of alcohol, for beverage purposes, and that is what the Volstead Act prohibits. *Vigliotti v. Commonwealth of Pa.*, 258 U. S., 403.

"The Congress and the several states shall have concurrent power to enforce this article by appropriate legislation" is the language of the second paragraph of the Eighteenth Amendment. The words "concurrent power" are not used here in the sense of denoting or designating the source of the states' power to legislate on the subject of prohibition, but as indicating that the power of Congress shall not be exclusive. *Commonwealth v. Nickerson*, 236 Mass., 296; 128 N. E., 273; 10 A. L. R., 1568. The amendment is a grant of power so far as the Congress is concerned, but not so as to the states. They had the power to legislate on the subject prior to the amendment, and they still have concurrent power with the Congress to enact appropriate legislation for its enforcement. *S. v. Harrison*, 184 N. C., 762. If the section now in question had been enacted the day after the adoption of the Eighteenth Amendment, obviously it would have been "appropriate legislation," by this State, in aid of its enforcement. It is not less so because the statute was already in existence at the time of the adoption of the amendment. *Lanza et al. v. United States*, Law ed., p. 169. There may be varying degrees of appropriateness in the legislation on this subject, but a state statute will not be declared inoperative and void unless wholly inappropriate, or unless it be in conflict with the paramount law. *S. v. Muse*, 181 N. C., 506.

The defendant's motion for judgment as of nonsuit was properly overruled.

No error.

STATE v. CHARLES L. WILLIAMS.

(Filed 7 March, 1923.)

Evidence—Questions for Jury.

APPEAL by defendant from *Calvert, J.*, at September Term, 1922, of CRAVEN.

Criminal prosecution, tried upon an indictment charging the defendant with seducing an innocent and virtuous woman, under promise of marriage, in violation of C. S., 4339.

From an adverse verdict and judgment of 3 years on the roads of Craven County, the defendant appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

D. H. Willis, George T. Willis, and Charles L. Abernethy for defendant.

STACY, J. The evidence of the defendant, and that favorable to him, if believed, was amply sufficient to warrant the jury in returning a verdict of acquittal, but they have taken a different view of the matter. The case presents nothing but a question of fact, and this has been settled by the verdict. No benefit would be derived from detailing the evidence.

We find no error in law, and the judgment will be upheld.

No error.

STATE v. DAVID FAULKNER.

(Filed 7 March, 1923.)

1. Abandonment—Husband and Wife—Statutes.

The provisions of C. S., 4447, as to abandonment, applies to the abandonment by the husband of his wife before children born of the marriage, making it an indictable offense.

2. Same—Marriage and Divorce—Defenses.

Where the husband has been indicted, tried, and convicted for the criminal abandonment of his wife, C. S., 4447, and upon appeal he has been granted a new trial, the fact that since his former conviction his wife has obtained an absolute divorce from him will not avail him as a defense.

3. Abandonment—Statutes—Enlargement of Powers.

C. S., 4449, conferring upon the judge having jurisdiction of the offense of the husband abandoning his wife, etc., the power to provide for the support of the abandoned wife and children is in addition to the powers

conferred by the previous section (4447), and does not otherwise modify or interfere with its force and effect in making the abandonment of the wife a misdemeanor.

4. Abandonment — Constitutional Law — Legislative Discretion—Misdemeanors—House of Correction—Imprisonment.

Our Constitution, Art. II, sec. 4, making a person guilty of a misdemeanor punishable by commitment to houses of correction leaves this matter of establishing a house of correction discretionary with the legislative power, and a sentence may be imposed of imprisonment upon a husband convicted of abandonment under C. S., 4447, and other offenses of like kind, or to assign them to work on the roads during their term. C. S., 1359.

5. Appeal and Error—Evidence—Hearsay—Subsequent Competency.

The exclusion of hearsay evidence and the failure of the appellant to again offer it after the later introduction of evidence that might have rendered it competent, is not error.

APPEAL by defendant from *Horton, J.*, at October Term, 1922, of VANCE.

Indictment for willful abandonment of wife.

There had been a former conviction in the case at March Term, 1921, and judgment thereon having been set aside and a new trial ordered for prejudicial error, see *S. v. Falkner*, 182 N. C., 793, defendant, at the October term, as stated, was again put upon trial, convicted, and sentenced, and again appeals to this Court, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. H. Bridgers for defendant.

HOKE, J. It appears from the evidence that at the time of the alleged indictment there were no living children of the marriage, and it is insisted for defendant that in such case no conviction under the statute can be sustained, but the question has been resolved against defendant's position in the recent case of *S. v. Bell*, 184 N. C., 701, wherein the Court held that the act (C. S., 4447) makes it an indictable offense for a man to abandon his wife or the children, and the exception is therefore overruled. And in several other cases convictions under this statute have been upheld wherein it appeared that there were no living children of the marriage. *S. v. Toney*, 162 N. C., 635; *S. v. Taylor*, 175 N. C., 833; *S. v. Beam*, 181 N. C., 597.

The defendant excepts further that the court overruled defendant's plea setting up a divorce had at the instance of the wife since the former trial of the cause, but the evidence as accepted by the jury established a completed criminal offense at and before the former trial in 1921, and

there is nothing in the statute, nor is there any principle of law, that gives to a divorce subsequently obtained any such effect as that claimed.

True, in the subsequent section (4449), the statute confers upon the judge having jurisdiction power to make such orders as he may consider necessary to provide for the support of an abandoned wife and children, but this is only an additional power conferred and resting in the discretion of the trial judge or recorder, and does not and was not intended to otherwise modify or interfere with the force and effect of the principal section, No. 4447, which constitutes the forbidden conduct a misdemeanor, as stated.

Again it is objected that under our Constitution, Art. II, sec. 4, persons guilty of a misdemeanor can only be punished by commitment to houses of correction, but a perusal of this provision will disclose that this method of dealing with convicted defendants is discretionary with the Legislature, and accordingly it has been directly held that for this and other offenses of like kind such defendants may be sentenced to imprisonment and assigned to work on the roads during their term. C. S., 1359, and *S. v. Weathers,* 98 N. C., 685.

The objection to the rulings of the court excluding certain evidence is without merit. At the time offered it was mere hearsay, and clearly incompetent, and the same was not again offered after the testimony of witnesses subsequently examined might have rendered the excluded evidence receivable in contradiction.

We find no error in the record, and the judgment on the verdict is affirmed.

No error.

STATE v. JULIUS MOORE.

(Filed 14 March, 1923.)

1. Homicide—Criminal Law—Malice—Evidence—Appeal and Error.

The issue of murder in the second degree involving the element of malice, and on the trial there is evidence that the defendant killed the deceased at a dance in a warehouse where the deceased and another were disturbing the dance by a quarrel, and there is further evidence that the prisoner killed the deceased in self-defense, requiring that the defendant should have been without default in provoking a quarrel with the deceased, it is competent for the defendant to show that he was in charge of the warehouse for the owners to protect it and preserve order, and that he interfered with the quarrel in the performance of a duty, in order to rebut the idea that he was in fault in bringing on the fight, and the element of malice involved in the issue; and where the verdict is guilty upon this issue, the exclusion of this evidence by the court constitutes reversible error.

2. Homicide — Criminal Law — Evidence—Character—Substantive Evidence—Appeal and Error.

Where, upon the trial of a homicide, there is evidence of the bad character of the prosecuting witness, and of the good character of the defendant, a charge of the court that the jury should consider this evidence in relation to the credibility of the testimony of each, constitutes reversible error in confining the evidence of the defendant's good character to the credibility of his testimony, and excluding it as substantive evidence on the issues.

APPEAL by defendant from *Grady, J.*, at January Criminal Term, 1923, of PITT.

Indictment for murder. The State did not insist on a conviction of murder in the first degree, and "defendant was put on trial for murder in the second degree, or manslaughter."

There was conviction of murder in the second degree, and from judgment on the verdict defendant excepted and appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Albion Dunn for defendant.

HOKE, J. There was evidence on the part of the State tending to show that on the night of 24 December, 1920, there was a dance for colored people in the warehouse of J. N. Gorman in said county, attended by deceased, and the prisoner and others. That about 8:30 p. m. there was a fuss going on between Rosa Davis and her husband, and during this altercation the deceased and the prisoner became also involved in a quarrel, and prisoner shot and killed the deceased. That fatal shot was fired when the deceased was down and helpless, or just as he was rising up, and the killing was without any adequate provocation or legal excuse.

There was evidence for defendant tending to show that he was an employee of Mr. J. N. Gorman, who had let them have the warehouse for the dance. That hearing the quarrel between Davis and his wife over near the piano, defendant went over and spoke to the persons there with the view of quieting the fuss. That Mr. Gorman had the side doors of the warehouse fastened, and James Grimes, who is said to have started the row, and his brother-in-law, Arthur Marshburn, and principal witness for the State, asked to get out by the side doors. That defendant told them they would have to go out by the front door. That Grimes took offense at witness's speech and asked what in the hell he had to do with it, and said: "I'll beat your damn head off. You think you are something because you have got charge of this warehouse." And Marshburn, the brother-in-law, said: "Rush him, James, and cut his damn throat." That James came on defendant with a knife, and that defendant backed

away as much as 70 or 75 feet and shot once into the floor in front of deceased in the hope of stopping him. He coming on, deceased and defendant came together and both fell. That defendant jumped loose from deceased and was cut on the finger with the knife, and as he came again on, defendant shot and killed deceased, and that it was necessary to do it to save himself. That the pistol used was one belonging to the warehouse, and had been given to defendant by Mr. Gorman something like half an hour before the homicide.

In the course of defendant's evidence he was asked as to what were his duties as employee of Mr. Gorman. On objection the question was excluded and exception noted, the case stating that the answer would have been that defendant, as employee, was watchman of Mr. Gorman's warehouse. Again, defendant proposed to show that during the evening, and not long before the killing, Mr. S. G. Gorman, brother of the owner, and "acting in the interest of the warehouse, being down there, had told defendant to take care of the warehouse and to see that no fireworks were shot, and to keep down all disorder." On objection, this evidence was also excluded, and defendant excepted, and in our opinion both of these exceptions must be sustained. The court in its charge had very carefully and correctly impressed upon the jury the principle that defendant could not maintain the position of a perfect self-defense if he was at fault in provoking the difficulty. *S. v. Finch,* 177 N. C., 599-602, and *S. v. Kennedy,* 169 N. C., 327. And in our view this proposed evidence was competent not only as an aid to the jury in forming a proper concept of the conditions presented, but also as tending to negative the element of malice involved in the offense of murder in the second degree, and as presenting defendant's claim that in approaching the people engaged in a quarrel and asking them to desist he had reasonable ground to believe that he was acting within the range of duties rightfully incumbent upon him. *S. v. Holliday,* 111 L. Rep., 47.

Again, there was evidence offered by defendant to the effect that the character of Arthur Marshburn, the principal witness for the State, was bad, and that the character of the defendant was good, and in the charge, speaking to this testimony, and the only reference made to it, the court instructed the jury as follows: "Evidence has been offered, gentlemen of the jury, tending to show that the character of the witness Marshburn is bad, and that the character of the defendant is good. That testimony should be considered by you in placing such credit upon the testimony of these two men as you may see fit and proper to place upon it, after considering the evidence as to their general character."

It is fully recognized in this jurisdiction that in an indictment for crime, a defendant may offer evidence of his good character and have same considered as substantive testimony on the issue of his guilt or

innocence. And where in such case a defendant has testified in his own behalf and evidence of his good character is received from him, it may be considered both as affecting the credibility of his testimony and as substantive evidence on the issue. *In re McKay*, 183 N. C., 226-228; *S. v. Morse*, 171 N. C., 777; *S. v. Cloninger*, 149 N. C., 578; *S. v. Traylor*, 121 N. C., 674; *S. v. Hice*, 117 N. C., 782.

From the language and mere natural meaning of the above excerpt of his Honor's charge, and from the connection in which it appears, we think the jury may very well have inferred that in reference to this evidence of the good character of the defendant they could only consider it as affecting the credibility of his testimony, and he was thus deprived of the principle that it was also substantive evidence on the issue of his guilt or innocence. For the errors indicated, we are of opinion that defendant is entitled to a new trial of the cause, and it is so ordered.

New trial.

STATE v. H. M. LEWIS AND W. G. PADRICK.

(Filed 14 March, 1923.)

1. Criminal Law—Actions—Consolidation—Indictment—Statutes — Misdemeanors.

C. S., 4171, changes the offense of a conspiracy committed with deceit and fraud formerly punishable by imprisonment in the penitentiary into a misdemeanor, although the punishment is more severe than that prescribed for a misdemeanor at common law. C. S., 4173.

2. Same—Counts—Joinder.

Different counts relating to the same transaction, or to a series of transactions tending to one result, may be joined in one indictment of the same defendants, although the offenses are not the same grade.

3. Same—Misjoinder—Multiplicity.

Where there is conviction under counts of an indictment with evidence sufficient that the two defendants were guilty of the offense charged, one as principal and the other as accessory, and the jury has returned a verdict of guilty on each of the counts, each of the defendants is equally guilty; and exception for misjoinder or multiplicity on the ground that one count was solely against one of the defendants is untenable.

4. Criminal Law — Accessory — Conspiracy—Indictment—Evidence—Instructions—Trials.

Where there are counts in an indictment charging that the two defendants had conspired together to commit the crime alleged, and the evidence

tended to show that each was guilty or innocent of the conspiracy, an instruction is proper that if the conspiracy is established they both must be found guilty.

APPEAL by defendant Lewis from *Horton, J.*, at October Term, 1922, of VANCE.

The grand jury returned five indictments against the defendants. In the first they are charged with the larceny of a check for $1,000, the property of the United States Fire Insurance Company of New York, and receiving the check knowing it to have been stolen; in the second and third, with conspiracy to defraud the insurance company; in the fourth, the defendant Lewis is charged with obtaining $1,000 from the insurance company by the false representation that his car had been stolen and the defendant Padrick with being accessory before the fact; and in the fifth, the defendant Lewis is charged with practically similar false pretenses.

The defendants did not offer any evidence. The State's evidence tended to show these circumstances: In February, 1921, the defendant Lewis purchased from his codefendant Padrick a five-passenger Essex car, which was identified by its shape, chassis, color, etc. Lewis paid a part of the price, and on 14 February, 1921, gave his note for $704 to Padrick, who endorsed it and had it discounted by the First National Bank of Henderson. On 8 February, 1921, Lewis insured the car for $1,000 against loss by fire or theft. About 1 June, 1921, Lewis became a policeman in Henderson, and remained on the force until 1 February, 1922. On the night the car was reported as stolen, 25 August, 1921, Lewis and a man named Wooten were engaged in conversation for some time near the car. The car was missing about two hours later, when Lewis went to the firehouse and, after saying his car had been stolen, phoned to several towns in regard to this theft.

Sixty days later the car was in Padrick's possession. About this time Padrick sent the car at midnight to the home of a man named Pearce, who operated a repair shop or garage out in the country to have it repaired. Next morning Pearce found that the motor would not work and had to be replaced by another. Padrick told him to take the old motor out and put in another, which Padrick sent him. After it was repaired, Padrick got the car and used it until the middle of December, 1921, when he sold it to W. T. Nash. While Nash had it, Lewis saw the car nearly every day. Kreidt bought it from Nash in January, 1922, and Lewis saw it frequently until the middle of May. When Kreidt asked Lewis if it was his car he answered "No."

The detective Davis testified that the numbers on the car on which the defendant Lewis collected the $1,000 insurance were the same as the factory numbers of the car he found in the possession of Kreidt except

the number of the motor. The detective then gave six numbers on the car taken from Kreidt which were the same numbers as those on the car for which the defendant Lewis had obtained the insurance. As further identifying the car, R. W. Ellington testified that some time in May, 1920, he bought an Essex five passenger touring car from Padrick, color green. He kept the car about seven months and traded it back to Padrick. In the car found in Kreidt's possession and on the button which is used to make the horn blow, the initials "R. W. E." were scratched with a pin.

During the progress of these transactions, Lewis was often seen with Padrick, who kept an automobile accessory establishment. The note discounted in the First National Bank had Padrick's name as endorser and Lewis' name as maker on it.

The insurance company did not settle Lewis' claim until 4 February, 1922. There are about seven or eight Essex cars around Henderson. All these cars are easily identified.

The jury returned a verdict of guilty as to both defendants on all the counts. The defendant Lewis appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Brantley Womble and Ben. T. Holden for appellant.

ADAMS, J. On motion of the prosecution, his Honor ordered the consolidation of all the indictments, and the defendant excepted. If the several bills could have been incorporated in a single indictment as separate counts, there was no sufficient legal objection to the order of consolidation, and in the absence of legal objection the question was addressed to the sound discretion of the court.

Two offenses, it is true, cannot be charged in the same count, for in such case the count would be bad for duplicity (*S. v. King*, 106 N. C., 683); but, says Archbold, "There is no objection to stating the same offense in different ways, in as many different counts of the indictment as you may think necessary, even although the judgment on the several counts be different, provided all counts be for felonies or all for misdemeanors." 1 Archbold's Cr. Pr. and Pld., 93, 95. Two of the counts charge the defendants with a conspiracy. Formerly a conspiracy committed with deceit and intent to defraud was punishable by imprisonment in the penitentiary, but by virtue of a change in the statute it is not now a felony (C. S., 4171), although the punishment is more severe than that prescribed for misdemeanors at common law. The Code, sec. 1097; Rev., sec. 3293; C. S., 4173; *S. v. Mallett*, 125 N. C., 723; *S. v. Howard*, 129 N. C., 662.

The reason which was urged in England against the joinder of a felony with a misdemeanor was that the defendant would thereby lose the benefit of having a copy of the indictment and a special jury, and of making his full defense by counsel (1 Archbold, 93, n. 2), but with us this reason cannot apply, and it is now held that different counts relating to the same transaction or to a series of transactions tending to one result may be joined although the offenses are not of the same grade. *S. v. Burnett,* 142 N. C., 578; *S. v. Howard,* 129 N. C., 585; *S. v. Jarvis, ibid.,* 698; *S. v. Harris,* 106 N. C., 683; C. S., 4622; *S. v. Mills,* 181 N. C., 531; Bishop's New Cr. Pro., sec. 423 (4).

The inclusion of the last bill charging a separate offense against the defendant Lewis is not fatal on the ground of multiplicity or misjoinder, because in another on which they were convicted the defendants were jointly charged with the same offense, one as principal and the other as accessory. *S. v. Harris,* 106 N. C., 683. There was no motion at the close of the evidence to require an election, and, besides, the jury returned a verdict upon each of the counts. As the rights of the appellant seem to have been carefully guarded at the trial, we perceive no reason for holding as a matter of law that the consolidation of the several indictments necessarily operated to his prejudice, and we fail to discover any indication of an abuse of his Honor's discretion.

The exception to the court's refusal to dismiss the action as in case of nonsuit is without merit, for evidence in support of the verdict was plenary; and as Padrick and Lewis were indicted for unlawfully conspiring together to commit a crime his Honor properly instructed the jury that as to this charge both must be found guilty or both not guilty.

Upon examination of the whole record, we conclude that the other exceptions require no discussion. We find

No error.

STATE v. GEORGE WILLIAMS, FRANK DOVE, AND FRED DOVE.

(Filed 21 March, 1923.)

1. Criminal Law—Evidence—Dying Declarations—Constitutional Law.

The principle upon which dying declarations may be received in evidence in criminal cases is not in violation of the defendant's constitutional right to confront his accusers, as they have been admitted from necessity.

2. Homicide—Murder—Dying Declarations—Evidence.

Upon the trial for murder, the declarations of the deceased that he knew he had been fatally shot and would die from the effects of his wounds, which, after his lingering a few days, resulted in his death, and his stating

under these conditions the names of the defendants as his slayers are sufficient as dying declarations to be received as evidence by the testimony of the one to whom he had made them.

3. Same—Mentality—Inferences.

Where, upon the trial for murder, the declarations of the deceased are admissible in evidence as dying declarations, and all the evidence tended to show that he had made them voluntarily and without suggestion, but after lingering a few days he had become unconscious preceding his death, conjectures are not available as a defense that the declarations were made at a time that the condition of the deceased rendered his mind incapable of comprehending his declarations, or that they were drawn from him solely as a result of questions asked him at the time, and were without foundation in truth.

4. Same—Verdict—Conviction.

Where the prisoners on trial for murder have been identified by the competent dying declarations of the deceased as his murderers, and there is evidence that the defendants had a grudge against the deceased, had declared that "they would get him," and the death resulted from a conspiracy they had formed to kill him: *Held*, the evidence was sufficient to sustain a verdict convicting the prisoners of murder in the first degree.

5. Criminal Law—New Trials—Newly Discovered Evidence.

Another trial for newly discovered evidence will not be granted in a criminal case, or a motion therefor sustained by the court, on the sole ground that some of the witnesses had since changed from their evidence given upon the trial.

6. Jury—Criminal Law—Special Venire—Qualification—Talesmen.

Where a juror has been drawn from the jury box by the statutory method, to serve on special venire for the trial of the prisoner for murder, and summoned accordingly by the sheriff, C. S., 2326, an exception to a juror retained by the court that he has served on the jury within the last two years, and that prisoner's challenge of him has been disallowed, is untenable, the provision relating to talesmen not applying in such instances.

7. Jurors—Challenging for Cause—Court—Influence.

A challenge of a juror for cause must be made in open court, and the refusal of the trial judge to entertain it privately, and not in the hearing of the jurors, upon the apprehension that they might be prejudiced by the challenge, is not subject to exception; the findings of fact thereon by the trial judge being conclusive on appeal, and being sufficient to sustain the ruling of the court.

8. Appeal and Error—Evidence—Hearsay—Harmless Error.

That a witness on a trial for murder has stated to another witness what the deceased had stated to them, as a part of his dying declarations, is at least harmless, if objectionable as hearsay, when it is but a repetition of the evidence to which he has testified.

9. Appeal and Error—Objections and Exceptions—Instructions—Contentions.

The recitation of the judge of the State's contentions upon a trial for murder, if incorrect, should be called to the attention of the judge in time

for him to make proper correction, or objection thereto will be considered as waived; and such cannot be objectionable as an expression of his opinion upon the facts when he has clearly told the jury that he had none and had not formed one, and his language was not in form or substance equivalent to such an expression of his opinion.

10. Appeal and Error—Harmless Error.

Only prejudicial error is reversible on appeal.

11. Homicide—Murder—Implied Malice.

Upon a trial for murder, malice, in a legal sense, will be implied from a wrongful or intentional killing of another, without lawful excuse or mitigating circumstances.

12. Instructions—Witnesses—Interest—Appeal and Error.

Where the relatives of the prisoner on trial for murder have testified, an instruction that the jury should receive their testimony with caution and scrutiny is sufficiently explained by his further charge that after such scrutiny they must give it as much credit as the testimony of a disinterested witness if they were satisfied that they were telling the truth.

13. Instructions—Excerpts—Corrected Error—Appeal and Error.

If the trial judge in his charge to the jury has committed error in an excerpt from his charge upon the evidence of a conspiracy to kill, resulting in the death of the deceased, for which the defendants are on trial for murder, in omitting to charge that the jury must find that the accessories were present at the time one of them did the actual killing, such error, if any, is cured by his having previously charged to that effect, the charge being construed as a whole.

14. Witnesses—Accomplices—Evidence—Instructions.

Where an accomplice in the murder for which the defendants are being tried has given unsupported evidence tending to convict them, a charge of the court is without error to defendants' prejudice that while the jury may convict upon such evidence, it is dangerous and unsafe to do so; but if the testimony of an accomplice, taken with other facts and circumstances in the case, carries conviction to the minds of the jury, and they are satisfied of its truth, and also satisfied beyond a reasonable doubt of the guilt of the defendants, the verdict should be for their conviction.

15. Instructions—Request for Instruction.

Where the trial judge has correctly charged upon principles of law in addition to those requested by the appellant, it cannot be held as error.

16. Same—General Charge.

The refusal of requested prayers for instruction that have been more succinctly and pointedly incorporated in the general charge cannot be held as error on appeal.

17. Criminal Law—Witnesses—Accomplices—Influence of Sheriff—Appeal and Error—Objections and Exceptions.

Where there is evidence that the defendants and another had accomplished their common purpose in killing the deceased, for whose murder the defendants are being tried, and there is evidence of the other person, theretofore convicted of the murder, that tends mainly, with dying declarations of the deceased, to convict the present defendants of the murder

charged, the objection that this witness was peculiarly under the influence of the deputy sheriff in whose custody he had been placed while attending court, should be taken advantage of, if tenable, before the trial court, and will not be entertained when taken for the first time in the Supreme Court.

APPEAL by defendants from *Cranmer, J.*, at October Term, 1922, of ONSLOW.

This was a criminal indictment, tried at the October Term, 1922, of Onslow Superior Court. The three defendants, George Williams, Frank Dove, and Fred Dove, were tried jointly for the murder of Cyrus Jones. Willie Hardison was tried first, and separately from the three defendants, for the same offense, and was convicted of murder in the first degree. The three defendants in this cause were also convicted of murder in the first degree.

The evidence of the State was to the effect that Cyrus Jones, a mail carrier from Swansboro, who also operated an automobile for hire, was shot on the highway about a mile and one-half from the town of Swansboro, at or about seven o'clock on the afternoon of 5 August, 1922. After he was shot, he drove his automobile back to the home of a neighbor, John Midgett, where he stopped, his wife, at the time, being away from home. Midgett answered his cries for help and asked him what was the matter, to which he replied that he had been beaten to death, and there was no chance for him, and asked that he might be taken out of the car and into his home. Midgett then asked him who had beaten him, and his reply was, "Collins, Williams, and Doves." There was ample evidence to the effect that Willie Hardison was known in the community as Collins.

The news of the mysterious shooting of Jones was noised throughout the community, and his neighbors hastened to his bedside. He told those standing about to get the doctor — that there was no chance for him to live, and to different witnesses he stated that Collins, Williams, and Doves shot him in an effort to take his car. He languished from Saturday until the following Wednesday night, mostly in a subconscious state of mind, when he died of meningitis, caused by a gun-shot wound inflicted in the left side of his head with a size four or six shot.

Hardison testified that some time prior to 5 August, Jones, who operated an automobile for hire, had taken him and the three defendants to a place called Marines, some ten or twelve miles away, to a dance; that Jones had an understanding with his passengers that they were to leave at 12 o'clock, and, failing to get them together at that time, he left them at Marines. Hardison said that the three defendants in this case told him that they intended to "get" Jones for leaving them at Marines; and on Friday night, before Jones was shot the following day, Hardison, the three defendants, Williams, Frank and Fred Dove, and one Clyde

Sanders met at a tobacco barn belonging to one Nash Bell, where Hardison was curing tobacco, and that they then and there agreed upon and planned the killing of Jones; that Hardison was to tell Jones the following morning that the three defendants wanted him (Jones) to take them to a place called Stella on Saturday afternoon, and that they were to meet at or near a colored church a little more than one mile from the town of Swansboro. It was agreed that the gun with which they were to kill him was to be hid in the woods, and a bush was to be thrown in the road so as to indicate to the defendants where the gun was concealed. When this point was reached, they were to stop Jones on the pretext that they had some whiskey hid in the woods and wanted to get it.

Hardison said that he saw Jones on the morning of 5 August and made the arrangements, and it was agreed that he (Jones) would come by for them about six or six-thirty in the afternoon. The evidence of the State is to the effect that Jones passed the colored church about six o'clock in the afternoon, having with him, as a passenger, one Captain Merritt, and that Hardison was standing in front of the church waiting for him. Hardison told Jones that they were ready. Later, the three defendants came by the church where Hardison was and told him that they would go on a road leading out from the main Swansboro road, referred to in the evidence as the Belt Road, and would there wait for Hardison to come with Captain Jones. Hardison said that Jones came by the church, took him in the automobile, and that they went out the road in the direction the three defendants in this action had gone; that the three defendants got in the car, and that when they reached a path that led to the place where Hardison stayed, he got out of the car, but he noticed, in a minute or so, that the car had stopped about one hundred and fifty yards further up the road; that he went to the car and asked Captain Jones where the defendants were, and that Jones told him they had gone into the bushes to get some whiskey, so they said. Hardison says he went a short way into the bushes and there he found the three defendants in a squatting position, and that Williams had the gun drawn on Jones, ready to shoot, and that they made him (Hardison) take the gun and fire the fatal shot, which, he says, he did. Hardison says they all went to Jones after he was shot, tried to stop his hollering, turned the car around and started him back on the road towards Swansboro, and that they all then fled.

There was evidence on the part of the State that the tracks around the automobile indicated that several persons had been in and around the car. There was further evidence to the effect that the three defendants were seen coming out of Swansboro in the direction of the colored church, and that the defendants Doves were seen within forty-five or fifty yards

of the colored church about six o'clock, and that the defendant Williams was seen a little before this time coming out of Swansboro.

There was some evidence to the effect that one of the Doves had stated during the week that he expected to be in New York the following week; and Williams had also stated to one of his companions at the sawmill that he did not any more mind killing a man than he would a snake.

It will be necessary to state some of the evidence a little more particularly so as to fairly and fully present one or two serious questions in the case, which we will now proceed to do.

Dr. J. P. Henderson, witness for the State, testified: "Am a practicing physician at Swansboro; practiced since June, 1915; knew Cyrus Jones; called to see him the evening of 5 August this year; arrived about 8 o'clock. He was at the home of Mr. Midgett, a next-door neighbor, in bed. His condition was what I would term shock; his pulse was very rapid. His extremities were beginning to get cold. Showed evidence of a gun-shot wound in the left temple region. His clothes very bloody. There was a penetration of the skull just in front of the left ear at this point (indicating) about the size of a dime; the bone was detached but not broken away from the point of penetration; gun shot had penetrated left side of head from upper portion of the neck to the top of the head. The shots entered at an angle of about 45 degrees—very little more than that. I can show you better than I can tell you—about like this (indicating): entered so that penetration was upward. Larger number of shots seemed to have entered this part than any other place. It was the left temple region. Just about a quarter of an inch in front of upper insertion of left ear and above the zigmoid -that is the process of the temple bone, which meets the process of the maxillary bone outside of the skull. Found one bruise on left costal cartilage near junction of the cartilage with ninth rib; there was a small bruise about an inch and a half in length, as best I can remember. Another bruise just below that smaller, about half the size of first. They were the only bruises, unless they were masked by these gunshot wounds. The wounds were on the left side; I believe he was conscious, partially conscious, I would say. Think he remained so about thirty minutes; did not regain consciousness afterwards that I know of. Died on the following Wednesday after shooting. Saw him after he was dead. Think he died of meningitis as result of gunshot wound."

Cross-examination: "From character of wound, the probable position of person who fired the shot with reference to the body was at a point opposite the left side of the man's head. Shot seem to have entered direct, going slightly up. Probed some of the shot wounds, but not the inter-cranial wound, one inside the skull. No powder stain on person that I noticed. Impossible to tell just how many shot struck him. A

great many, though, not a few. At a place indicated shot seemed to have gone in a wad; others just single shot wounds. Outer table of skull was broken. Dr. Jones made an incision in the scalp just at base of posterior extremity of left parietal bone, the bone that makes up the vault of the skull on the left side. Found outer table penetrated; did not ascertain whether shot entered brain at that point—probably they did. Large one of wounds or bruises on body, about inch and a half long, nearly inch wide; small one near inch square, about two and half inches apart. Skin what we term grazed; bruised, but not broken enough to bleed—bruised in a scratchy way. Appeared to be same clothes on him when shot. Noticed no break of garment where bruises were. I said yesterday he was partially conscious—best I remember. Don't remember using term semi-conscious. Semi-conscious means partially conscious, and may mean more or less conscious. There was some consciousness—enough to cause man to speak when asked certain questions. I stated that in half hour of consciousness he had gone to stay, so far as I know. Shot had penetrated the brain and death resulted from that. Lower shot had penetrated the brain. Had gone upward at some kind of angle through the skull cavity, very slightly upward. At two places shot went in bunches. Place in front of ear was larger bunch; hole cut about the size of a dime."

Mrs. Cyrus Jones, widow of deceased and witness for the State, testified: "Live at Swansboro; saw my husband after dark after he was shot, close to an hour after he was shot; he was unconscious; was notified at my father's about a mile from the village. When I got to him he was conscious, but I was overcome and unable to go to him for about 25 or 30 minutes, and when I then saw him he was unconscious. Couldn't say he regained consciousness before he died. Sunday afternoon appeared to be somewhat conscious. Witness details reason why she thinks consciousness may have returned to him. He died Wednesday after dark, around eight o'clock, after Saturday on which he was shot. Right around two o'clock on his return from Maysville he left about $85 with me, on day he was shot, and kept $10. He was in the habit of bringing money from Maysville and leaving it with me when he got checks cashed for people or he would give it to them at the postoffice when they lived in the village, or would leave it with Mrs. Davis. He was mail carrier and ran automobile for hire. Frequently carried money for people to Maysville and back. Got checks cashed for people in the village right often. I suppose this was generally known in that section."

John Midgett, witness for the State, testified: "Live at Swansboro; knew Cyrus Jones; saw him afternoon of 5 August somewhere around seven o'clock. Was eating supper; heard a car pass going in, heard somebody hollering, and jumped up and ran to the door; looked down

road; jumped out and ran down there and then saw it was Mr. Jones, and I ran up to him and said, 'Cy, what is the matter?' (Each defendant objected and excepted to the question and answer and each part of the answer separately.) He says, 'I am beat all to pieces. Take me and carry me in the house and get a doctor. There ain't no chance for me.' I took him out and carried him to my house and asked him, 'Cy, who beat you?' (Each defendant excepted to question and answer.) He said, 'Collins, Williams, and Dove.' I said, 'Cy, what did they beat you about?' He said they were taking his car. I asked him where he wanted to go, and he said 'To your house,' and I carried him and set him on the bed and he called for water and I gave it to him and he spit it out. Told me to get the doctor for him, take him out of the car and to the house and get him a doctor, and that there was no chance for him. I got Freeman to go for the doctor, who was there about twenty minutes after I took him out of the car. Before I asked him who beat him up, he stated there was no chance for him.

"Q. Who did he say beat him up, if anybody? (Objection and exception by each defendant to the question and the answer.) Witness answered, 'Collins, Williams, and Dove.' He remained in my house until he died; was conscious when the doctor got there. Lived about twenty yards from me; died Wednesday, seven minutes after eight o'clock following 5 August."

Cross-examined, the witness testified: "His statement to me about who shot him was made about seven o'clock. I told it that night—don't know exactly what time nor to whom. Don't remember whether I told it to the first people who came. When I first asked him, he said Collins. Don't know how many Collinses in that neighborhood, nor how many Doves. Some people call him Willie 'Collins,' and some call him Hardison. Knew his name only as Collins up to the shooting. Told crowd there what the sick man had said. Don't know that I told it as soon as I got there. Went with the crowd that night to try to ferret out things. Went to John Dove's twice. Went first and examined guns—found nothing wrong, none of Dove's guns had been shot. Went back the second time and took Frank and Fred Dove down before the mayor, and guess the mayor examined them separately, and examined whatever evidence they could get. The boys then went back home and were arrested later. I went with them to George Williams' house that night. They examined the guns and found no gun there that had been shot; found only one gun. We examined Dove's, Williams', and Jimmie Harper's houses that night and found no freshly shot guns. We examined the guns. Harper and his son Henry came to the door at his house. I think they examined colored people's houses all around there that night after the wounded man had told me what he told and after I had told it to others. There

was in the neighborhood at that time John Dove and his brother and his son Jimmie and Frank and Fred Dove, all of them and the old man were there. We went to John Dove's brother's house the night of the shooting. He lives about 350 yards from the place of the killing, I suppose. Suppose John lives something like half a mile—maybe nearer a mile. I guess Frank and Fred lived with John. Was only with the crowds that went to Dove's and Williams.' I declined to talk with counsel for the Doves about the matter after I had been subpœnaed by them. The reason was I didn't want to tell about it until I got on the stand where they could all hear. Was not under subpœna by State at that time, but was subpœnaed by the defendants. Time Jones made the statement that he was done for, was before taken out of the car. I told the solicitor what I knew about it before that time."

R. W. Freeman testified: "Live at Swansboro; saw Jones on evening of 5 August; was down town and coming back home, got right to the gate. My wife came and said somebody hollered in distress, ran down the road, and got in a few steps of him, and John Midgett asked me to get the doctor, and said Cy was beat all to pieces." (Defendants, in apt time, objected on the ground it was hearsay; overruled; each of the defendants excepted.) Court said: "What the witness has testified to is not substantive evidence, but is to corroborate the witness John Midgett. If you find it does so, you being the judges." Witness further testified, "I got the doctor as quick as I could; Cy told the doctor that if they didn't do something for him he was gone."

"Q. What other statement did you hear him make?" (Objection by defendants; overruled, and defendants excepted to the question and answer.) "A. He said Collins and Dove murdered him or beat him. This was before the doctor arrived. He was in the house sitting up on the side of the bed. I heard his brother ask him who did it." "Q. What did he say?" (Objection by defendants to question and answer; overruled, and defendants excepted.) "He said Collins. That is all he said that time. His condition was very bad, bleeding. Looked like he had been beat to death and shot. The car was shot and bloody. The cross-bars of the car that hold the top had been shot, and I think some shot had penetrated through the top. Nothing the matter with the car except the shot through the top and cross-piece, except it was bloody all over the seat; pretty near a quarter inch deep in blood. There must have been a gallon or more blood in the car. Also saw two puddles where he was shot. This was next day. Must have been a half gallon at each place. Was blood on the inside of the car and indentation of the brace—two puddles of blood on the outside. Brace looked like some solid wad had struck it; like two or three shot might have gone together. Brace kind of battered up. Was there in five or ten minutes after Jones was

taken to Midgett's. First heard of it 50 or 75 yards away. I ran to it. Think Jones was conscious. Am not a doctor. Couldn't swear he was conscious. Must have stayed an hour before I went home; was there off and on till one or two o'clock. Didn't see bruises on body."

I. E. Rogers testified: "I live at Swansboro; saw Jones night of 5 August; first saw him sitting on his bedside at John Midgett's with his head hanging over, moaning and groaning—bloody all over—looked like he had been terribly beaten. (Exception.) I sat by him and said, 'Cy, what is the matter with you? Who's been beating you up like this?' He says, 'Collins and Doves.' (Each defendant in apt time objected and excepted.) He said, 'I wish somebody would run my car in the garage. It is out there in the road and somebody might run into it.' It wasn't but a little while before the doctor came. He said, 'Doctor, if you don't do something for me I shall die.'" (Objection to above by each defendant, and exception by each defendant.) The witness further testified: "I think Mrs. Freeman and Mrs. John Midgett and maybe Richard Freeman were there. He was in Mr. Midgett's house. Saw him next day, Sunday, pretty low and unconscious."

Willie Hardison, witness for the State, testified: "My name is Willie Hardison. Knew Captain Jones nearly two years. Captain Jones hasn't taken me to Marines. I have only been there once and came back with Nash Bell and his wife and two other men." The witness had been asked if Captain Jones ever took him, Frank Dove, Fred Dove, and George Williams to Marines prior to 5 August. Being asked what the defendants said to him with reference to Cyrus Jones leaving them at Marines, said, "They told me that they had it in for him and were going to get him; that George Williams, Frank Dove, Fred Dove, and Henry Harper told him that, two or three weeks before Jones was killed. They said he carried them down to Marines to a dance and left them, and they had to get some one to bring them back; told me at church on Sunday two or three weeks before he was killed. Told me nothing else but that they had it in for him and were going to get him. I saw them after that, maybe Sunday, when I went to church and Sunday School. Didn't see them subsequent to that when they had a conversation relative to killing Captain Jones." Being asked by counsel, "Did you meet with them at the tobacco barn? Now just go ahead and state to the jury all you know about Fred Dove, Frank Dove, and George Williams being in the plot to kill Captain Jones." Witness answered, "They didn't tell me anything about a plot to kill him; just asked me to ask him to take them to Stella to do some trading." Witness being further requested by counsel for State, "Well, just go ahead and tell everything they said to you at the barn." Said, "I was at the barn that evening when Nash Bell came from Greenville, and I came and told him I did not have any

oil to cure tobacco with, and just before dark Fred Fenderson came from Bear Creek and Nash Bell was fixing to go to town in his car, and he went with Fred and when he got back he called me and I went to the house, and he told me to come in and get supper, and I told him that I had had supper, and while I was there Frank Dove, Fred Dove, Cheevey Williams, and Red Harper and Henry Harper came there, four boys." The court: "What Williams did you say?" Answer: "George Williams did not come there to the house. When I went back to the barn, George Williams was there at the barn. No one but him was there. He and I sat down and drank some wine, and he said he wanted me to ask Captain Cyrus what he would charge to take four head up to Stella to do some trading, and he asked me to loan him the gun, and I said I would, but didn't have any shells, and he said he had to hurry back home and go to a lodge meeting. I told him he need not hurry, and he said he had to go home and put his clothes on, and he went, and directly I heard a car leave and Frank Dove, Fred Dove, and Henry Harper came out there, and Frank Dove asked me to ask Captain Cyrus, and I said I would, and they sat around there talking and wanting me to go back to the house after some wine, so they sat around there a little while and then went on home. I stayed at the barn all night curing tobacco. Next morning I went to Simon Bruton's after some shoes and returned after mail came in and went to Swansboro and to the mill and came back, and Captain Cyrus came around the corner and drove up after some gas and went in postoffice, and a man came behind him and wanted gas and he had to move his car, and I jumped on the running board and told him that George Williams asked me to ask him how much he would charge to take four head up to Stella to do some trading, and he said he was going to Maysville for a man and it would be pretty late before he got back—somewhere between six and seven o'clock—and he went on and I went up home with him and got out, and that evening I carried the gun down to George Williams' house right open on my shoulder—about three-quarters of a mile. I went to the church house, was sexton of the church, and directly after I got to the church Frank Dove came by with horse and buggy and I jumped in and took my can to get some oil down town, and Frank said he would carry the horse back, so that evening, about an hour after they had gone, they all came back to the church, George Williams, Frank, Fred, and Henry Harper. They told me when he came to bring him on up there to Dr. Blount's road, a little road that leads up there by Sanders'—and they would be up there by that little field when I got up there. About that time Captain Jones came by and had one man with him, and the preacher came along after that and I shook hands with him and told him I was going up the road there by Dr. Blount's, and I would overtake him; so I got into the car with

Captain Cyrus and went on up there not quite a hundred yards. I was the only one in there with Captain Jones, and there were four head of them when we got up there—all but Henry Harper, so I backed out, knowing there were four of them, so I said being as there were four of them and they were loaded I would go on up there to my road and get out; so George Williams got in front and the two Doves behind. I got in with them, and when they got to my road they put me out and then they hadn't gone far when the car stopped and I hadn't left this road and I went up there and asked where the boys were, and Captain Jones said they had something to drink and had gone in the woods. They had left the car and gone in the woods, so I went around there in the woods and when I got down there they handed me the gun—George Williams did. The Doves were right there. The Dove boys said, 'Go and shoot,' so I up and shot the man. It was right in the woods and when you step from the car track you are right in the woods, and he leaned over on the left side and Frank Dove grabbed him to keep him from hollering. George Williams was standing up there by him, and I got scared and ran and overtook the preacher. I went on by the path I was going before and on home. I carried the gun on until I got nearly home and hid the gun—threw it in the woods. Got it that night. Carried it home that night. When I started to run, after Captain Jones was shot, they told me not to tell it, that it would ruin their lodge. They said it several times. I was running. George Williams said it—not to tell it, that it would ruin the lodge. They told this six or seven times while I was running, before I got to my road. Don't know where I got the shell that I shot him with. Gun was loaded. Not loaded when I gave it to George Williams. I didn't have but one shell and shot that shell that evening over in the field at a crow. The shell had been in the house a good while. Nash Bell got it down at Marines a good while before—was old and couldn't see any figures on it. Boys said they wanted Captain Cy to carry them to Stella—some fifteen miles from the church, I reckon. Been down there two years lacking about two months. Came from Belgrade. Was driving a log wagon out there and Nash Bell took me in, as I had no father and mother. Didn't start from Swansboro with Captain Jones—got in with him there at the church, where I was cleaning up—colored church about a quarter of a mile from where the shooting took place. Boys waited for me somewhere around half the distance, not quite half. Boys were waiting at the field Dr. Blount lives in at one edge of it. Right on the front there is a little woods and the field between, and as you leave the main road it goes on out where a little road goes through back of Dr. Blount's house and comes out here by his gate—Mr. Harry Stanley's. There is no house between the church and the field there at Dr. Blount's. After you leave the church

there is another little field on the road besides one I talked about. No house on it. Somewhere around 75 yards to Dr. Blount's field. Uncle Lias Ambrose's house is first. When you are coming down towards the church you get to his house in the field before you get to Dr. Blount's field. When you are going out from the church towards where the killing took place, you first come to a little field. There are fields on either side of the road, and you get to that field on one side of the road about three acres, and on the other side of the field about four acres. The three-acre field is on the back side of the church from main Swansboro road. The church site right on the hill as you come from town. About 25 yards back of that church is the four-acre field on the right as you go towards the place of the killing, and on the left there is a three-acre field, and then you go on, and these boys were right at the corner of this four-acre piece. Didn't pass any house from church to where they were. Uncle Lias' house not on that field. Boys were standing right at the corner of this road that goes through by Dr. Blount's house and comes into other road. There were three boys there and four were to go. Those three and Mr. Jones were all in the car when we left that place, George on the front seat and all of us started together. First house passed was Clyde Sanders—not far, don't know exactly how far. Next house passed, George Williams'. I went with them about 50 yards beyond George Williams' and got out of the car." Being asked why he got out of the car, he said, "I was going home. I didn't know there was anything like that up." Being asked, "Well, as you didn't know there was anything like this up, why did you say that the Harper boy backed out?" He answered, "He backed out from going where he was going. I didn't stay long after I got out because the car went no ways—did not go anywhere. There is a crook up in the road, but they hadn't gone around that crook when they stopped. Went to the car because I thought they had a blowout or something. Don't know whether I had to go fifty yards or not. Didn't hear any blowout—went up as soon as the car stopped. Found Jones sitting in the car. Others not there, but about half length of the court room out in the woods. Asked where the boys were, and Captain Jones said they were out in the woods—had something to drink, and I went out there; found them fixing to shoot; kind of squatted with the gun cocked; pointing out in the bushes; didn't walk right up on them, kind of a path leading to where they were, I went beside them. Not far from them when they saw me—not right at them. Had gun about to his breast, George Williams did; squatted down; handed me the gun already cocked, told me to shoot Captain Cyrus, and I said, 'I haven't got no harm against him,' and he said, 'Shoot the man or we will kill you and him, too.' I was on the side of them—about the same distance from Captain Jones as they were. They

were all right in a bunch. Didn't hold gun long before I shot. Said nothing after they told me to shoot. I was standing up when I fired straight up. Sure didn't want to shoot him. I didn't back off and cover them with the gun and back up to Captain Jones instead of shooting him, because there were three of them and they could overpower me. I don't know what they had. They had their hands in their pockets. As soon as I fired we all went out of the woods. Captain Cy fell over on his side—on his left side, the side he was shot from. I didn't stay there more than a minute—said nothing to him; put my hand on him to see where he was shot—put it on his head. I didn't mean to kill the man. Fired to miss him and the wrong shot killed him—he didn't say anything. Frank Dove put his hand over Jones' mouth and I ran off. I left them at the car. Had to go about three-quarters of a mile to get back home. Threw gun in the woods about 200 yards from Nash Bell's; threw off across ditch; got back to Bell's about dark. He and his wife sitting on porch. I got with preacher. Hid gun before I got up to the preacher where I got on the main road. Preacher was ahead when I hid it—about 50 yards ahead. Hid gun because I was scared that they would put it all on me because I had the gun. Reason I didn't tell right away, I had been forced to shoot Jones, because I didn't know what they would do with me. Had gun in my hands until I saw the preacher, up side of my body swinging it. Carried it on my shoulder when I went to George Williams', but was running and had it in my hands when I was returning. Had gun in hands when I left Jones' car—ran all the way till I saw the preacher; got to Nash Bell's after supper, about dusk dark. Preacher was taken on in kitchen. I didn't eat any supper; went out on porch awhile. Had been curing tobacco and had not slept, so went on out and to bed. Had dropped off to sleep when people came to Bell's. Didn't hear them when they came up. Bell's wife standing at the front door talking. I heard them say Captain Jones was killed and they didn't believe I did it, but knew something about it. I remained in bed. They asked Nash if I was there, and he said 'No.' Nash thought I was gone; went back very quick. I didn't go to sleep afterwards. They didn't come back, but Mr. Clyde Pittman and others did. Don't know how long before they came back. After they left Nash Bell asked me if I knew anything about it; I told him no. I didn't borrow the gun from Nash; I lived there and had the gun at the barn—carried it up to Williams' Friday evening about three o'clock. Nash asked me where his gun was. I told him out at the barn leaning against the arch—barn about 20 yards from house. He went out and returned, said gun wasn't there; told me to get it pretty quick. I went and got it. About ten or fifteen minutes afterwards second crowd came. I was upstairs again and in bed when they came the second time. They told me to put on

my clothes and come downstairs. High sheriff, Mr. Clyde Pittman, called me down; didn't put on same clothes I had taken off that night because they were wet and lady didn't want me to leave them on the floor, so I took the clothes, pair of overalls, off; put on pair of dry pants; changed shirt; it was wet, too. I was wet through with water; little blood on the overalls; I hadn't even seen it; say blood was on leg of overalls. I didn't know it was there. They showed me a little blood on the cuff of my sleeve. Mr. Henry Jarmon did this and went upstairs and got the shirt. Some of them did this, didn't get overalls. When they brought shirt down and out to car in road I was there. They asked me if it was my shirt; I said yes. They asked me where I got the blood. I told them I reckon I had squashed a mosquito. Blood was on the cuff. I explained the blood on the overalls by my having stepped up on the running board and getting it on them. I hadn't seen that, though. They took me off—carried me to white folks' schoolhouse. Don't know all the crowd, but there was Henry Jarmon and the high sheriff. They asked me to tell them, and I told them I didn't know anything, and some of them were hollering, 'I wish we had a piece of rope,' and some said, 'Here is an inner tube, wonder can't we hang him with that?' Some man shot down by my feet and somebody hit me, and they said they didn't want to hurt me that way, and took me to a log and said, 'Now, boy, tell the truth about it,' and I said I didn't know what to tell, and they put me across the log and little Henry Jarmon said, 'That isn't the way,' and he got me down and they hauled off and hit me about four times, and somebody hit me with a stick. I don't know who it was, and I told them the names, and they said, 'Well, you ought to have told us that at first,' and they went and got the other ones. They carried me back and two cars stopped at a man's house and the car I was in went on down to the church again. Handcuffed me to the steering wheel and left a man there with me. I didn't tell them anything; just told them the other three, and they went back and got them. I did not tell them anything about who fired the gun then, but I did after I got to the New Bern jail. Talked to the high sheriff, this man here (points out Sheriff J. D. Williams of Craven County). He's first man I talked to besides the boy that was in jail that I talked to that night. Sheriff of Craven took me out in the room and asked me and I told him. Told him the same thing I told when I went out there and he asked me my age, and I told him fifteen years, and he asked if I had any living father and mother and I said 'No,' and he said, 'Just as a matter of business, go ahead and tell me about it.' So I told him these boys asked me to ask Captain Cyrus his charge to take four head up to Stella to trade, and I asked him, and he said have them ready between six and seven o'clock and he would come back, so they came back by the church

and told me they were going up the road apiece. We went up there and I got out at my road and the car stopped and I hadn't left the road, and I went up there and asked him where the boys were, and he said, round there in the woods, and I went over there in the woods and they handed me the gun and told me to shoot the man, and I said I didn't have any harm against the man, and they said shoot him, and I up and shot him, and went out in the road where the car was and stayed there about a minute and jumped and ran. I talked to somebody in Onslow jail about it. I did not tell the truth about it —was scared to tell anything. Don't know who it was in Onslow jail. Little Henry Jarmon and some more of them talked to me. I talked to Mr. Pete Smith and Mr. G. W. Jones before I went to New Bern; told them George Williams did the shooting. On the way told them I carried the gun to George Williams' house before the shooting; didn't tell them I carried the gun into the woods and hid it. Didn't tell Mr. Jones and Mr. Pete Smith that I took the gun out in the woods and hid it. Didn't tell Mr. Jones and Mr. Smith that in jail, but did tell them Williams did the shooting. Same man that was with Mr. Smith in jail went with me and the high sheriff to New Bern; don't remember his name. I told that man on the way to New Bern that I did shoot him, and told him I felt better after I told the truth about it. Was not with Mr. Cyrus Jones right often about Swansboro, only one time, the day of the killing, going out from Swansboro home, about two o'clock. Went home as he was going back to Maysville after a man on the late train; had understanding with Nash Bell I was going to buy his car, after cotton came off in the fall; was to make a cash payment of a hundred dollars when we sold cotton, if it brought anything. He gave me an acre and I had rented an acre from his father and planted cotton and sweet potatoes. I had helped make the wine Nash Bell had there. I know Frank Humphrey, not Jim. Loaned me 50 cents one time, which I paid back in a piece of meat. Don't know exactly when. Tried to borrow a dollar more from him and he wouldn't loan it to me, about a month before the killing. Didn't offer to sell him whiskey, because I had none to sell. Didn't try to sell Mr. Dick Freeman any whiskey, did not say that I had any whiskey out back of Pittman's field."

Cross-examined by Dove's counsel: "Since they put the stick on me, I have told the thing only two ways —one to save my life until the court, that George Williams did the shooting. Told in the presence of Sheriff Williams and counsel of Doves the same thing I have told today. Said it was done with the man's gun I stayed with; said it when I carried the gun to George Williams' house. Neither of Dove boys ever went off with me on trip to Marines. Never knew either of them to go on trip with Captain Jones; only what they told me. Never knew either one to do that. Told you that Frank Dove, Fred Dove, George Williams,

and Henry Harper got me to see if Mr. Jones on Saturday would take them to Stella to do some trading. Didn't swear yesterday in my trial it was to Maysville. Am certain I said Stella, and say Stella now. George Williams had the gun when I went out, and handed it to me. There wasn't any gun going up there in the car, when they left me. When they put the paddle on me, I told that other folks were in it besides myself. They told me they knew I was in it, and it would be better for me and easier for me if I implicated other people. I told them I did not know anything about it. They put me across a log, face down; two men took hold of my feet. I would not respond. They beat me with a stick before I told them what I did—hit me four times with an inner tube, and once with a stick; then I told them what I told, and am telling now. I had been down there before the mayor that same night and at the same time Frank, Fred, and George Williams were before the mayor. Also Baynor Blackwell was before the mayor. They examined me privately and listened to the witnesses. They didn't turn me loose—turned the other boys aloose. I hadn't implicated them. Don't know why I didn't tell them then—other boys were in it—was scared to tell anything. Never told in the presence of Larry Stanley or others that I hid the gun out there where he was killed, nor that I dragged bushes nor put some pinetops on the road so I would know where to stop and know where the gun was, nor that I hid gun out by the fence and told George Williams where to get it. I just told what the boys told me about Captain Cyrus carrying them off and not bringing them back. Just wanted people to believe what was right. The lodge was the Knights of Gideon. Dove boys not members—old enough but hadn't joined. Williams was a member. Knew that Captain Cyrus carried money for other people because he cashed check for me and Nash Bell's wife once, didn't know how much he carried. He was a mail carrier. Was not in store that afternoon when he paid for gasoline. Got his gas outside and went in the store with a crowd of people to pay for it. Didn't see his money at the postoffice that day. My oldest brother killed my father, I couldn't even walk or talk. I was convicted here yesterday of murder in the first degree; went on stand in my own behalf—swore I was forced to shoot Captain Cyrus. The boys were over in the woods some little distance from the road. I went where they were. They made me shoot him. I told them he had done me no harm, and I didn't want to shoot him. Captain Cyrus could hear good, but wasn't near enough to hear. Could hear all right, and had good eyesight. Front of car was turned towards Maysville away from church; left these three boys at the car, which was right in the road. When I shot, Captain fell over the door of the car towards me—blood came out. I went and left the other boys there; Frank Dove holding his mouth; my hand must have been mighty

close to the blood. Did not hide my clothes. Threw overalls out on the porch, not in the box. Put shirt in the back porch, not with overalls. Threw gun in bushes, and while in the act of getting back in road, I called preacher and he looked back and said something to me. Gun was broken apart. This done just as I was coming out on the main road, just before I got to the preacher. Just running along with it from killing to there, was in my hands while I ran past Graham's. Saw nobody at Graham's and saw nobody at Sanders' while going to where I shot Jones, nor anybody at George Williams' while going; between six and seven o'clock when I went by Williams'. Wasn't any time from time I left church till I got back where I met the preacher. Did it in a hurry—was scared and ran. When I left two were standing up and Frank Dove was holding his mouth. They came out of the woods; halfway from here to the door, stood up there by him. I beat the crowd and left them standing there. Bought shell evening he was killed from Mr. Bartley at Swansboro. Nobody acting as my lawyer till Mr. Bender was appointed. Man unknown to me talked to me a little about the matter in the room yesterday. When counsel for Frank and Fred Dove came to see me in Craven jail, they told me that they didn't represent me and for me not to tell anything that would incriminate me. Was not in the Holland road talking to two girls when Eugene Graham came along on Saturday afternoon of murder. Didn't try to get two girls to go to church and help me to clean up in a hurry. When I was going out there that afternoon didn't think any harm was going to be done to him. Thought they were all going off on a nice trip. Didn't have remotest idea any harm was going to be done him. Didn't tell people I told Captain Cyrus I was going to get wine out there in the woods. I did tell Captain Cyrus that morning that the two Doves and Williams wanted him to take the trip. They wanted to go to Stella because they didn't have the quality of clothes at Swansboro they had at Stella. Stella was not on railroad, nor ocean, but on a creek. More suits of clothes there than at Swansboro. Big stores there, I don't know owner. Do not deal in Stella. Told Mr. Fred Pittman the night they questioned me that man I got in the car with at church was a stranger and I didn't know him -told a lie because scared and didn't know what they would do with me. Just told that George Williams did the shooting to save my life till court. Am now telling the same story I told on the stand yesterday. Stated on cross-examination yesterday that I said George Williams did the shooting. Haven't talked with the solicitor about it, nor to counsel for State, till I got on the stand. I think the man in the room with me yesterday was Mr. Woodus Kellum. The man I stayed with sent to the Secretary of State and procured a Ford automobile license in my name, because I was to buy the car when cotton came off.

He got it in my name so when I bought the car the license would be on it. Don't know how long it was before the killing. Signed Nash Bell's name to paper without his authority and got some money. He afterwards paid it to keep me out of trouble. Captain Cyrus had the new Ford a little while before he was killed; don't know how long. Had seen his new Ford one day out at church before day he was killed. I told Captain Merritt the night they had me down there before mayor that I had on the same clothes then that I wore during the day, and he told me I was a liar, that I had on blue overalls and shirt and a straw hat when he saw me at work. I carried the shell home I bought from Mr. Bartley. Didn't give it to George Williams when I gave him the gun. It was at Nash Bell's when I left there. I left the shell there. Nash had it; got it after murder was committed. I had it in the pocket of my overalls; was a new shell; the one you have is the same one."

Captain Merritt testified: "I live at Swansboro; knew Cyrus Jones; was with him afternoon of 5 August from Belgrade to Swansboro, bringing me home in his new car. I was sick, and as we went he slowed down just before we reached the colored church, and I thought it mighty strange, and after slowing down he went a little further and slowed again, and directly he stopped and saw that boy." (Pointing to Willie Hardison.) Q. "You can tell what he said to that boy." (Objection by the defendants, and admitted by his Honor only for the purpose of corroborating the witness Willie Hardison.) A. "Willie Hardison said, 'We are ready, we are waiting for you right now.'" (Defendants objected and excepted to each part of the answer severally.) Witness testified further: "Hardison was standing on the colored church grounds. Captain Cyrus drove on and put me out and turned around and went on back; took a straight course in the direction Willie Hardison was. I went to the place where Mr. Jones was shot the next day. It was on the road that turned up there by the church; I never went up the road at all—just rode on by the church. It is off the main road on what is known as the Belt Road, I guess. I didn't wait up there often. I didn't see either one of the defendants, Williams and Doves, up there when Captain Jones brought me. Have known the defendants Doves ever since I have been around there, some 40 years, I think. Am not referring to the boys, had no dealings with them, was referring to their father, John. His character is good so far as I know. They have chartered my boat and I have had frequent dealings with the older ones; not acquainted with the reputation of Willie Hardison."

There was other and voluminous testimony tending to show the guilt of the defendants, and each of them, and that they conspired and acted together at the time of the homicide to murder Cyrus Jones, and that

Hardison had the gun, and shot Jones, the other defendants being present, aiding and abetting and encouraging him to do so, the shooting being from ambush.

The evidence for the defendants tended to show that they were not at Marines with Cyrus Jones, and had no feeling against him or resent toward him, and no reason to murder him, and that they did not kill him or assist in doing so, not even being present when it was done.

Upon this evidence and the dying declarations of the deceased, the jury convicted all of the defendants of murder in the first degree. Defendants appealed from the verdict and judgment.

Attorney-General Manning, Assistant Attorney-General Nash, I. M. Bailey, and McLean, Varser, McLean & Stacy for the State.

Duffy & Day for defendant Williams.

Ward & Ward for defendants Frank and Fred Dove.

WALKER, J., after stating the facts: This case was carefully tried, and the rulings during the course of the trial were well considered and made with strict regard to law and procedure.

The charge of the court was very full, learned, and explicit, and was perfectly fair and just to all the defendants, being, if anything, rather more favorable to them than they had any reason to expect. The jurors, if they heeded it, which they seem to have done, could not possibly have mistaken its meaning and significance. The contentions of the respective sides were very fully arrayed, nothing material or of importance being omitted therefrom. The law of the case was explained to the jury with great care and correctness, and the statute fully complied with in this respect.

Upon the evidence, including the dying declarations of the deceased, the jury convicted all of the defendants of first degree murder, that is, Williams and the two Doves, Hardison having been before convicted of the same crime.

Upon exceptions reserved by the defendants they appealed to this Court, and now ask us to review the entire record, so far as indicated by the specific exceptions, which we will now proceed to do.

It will be timely and appropriate at this stage of the opinion to repeat with some degree of fullness what the learned judge stated to the jury, in his charge, with reference to the dying declaration of Cyrus Jones, as the competency of what is called "his dying declaration" should be finally settled before proceeding further to discuss the case in the light of the evidence. It is as follows: "There has been admitted in evidence, gentlemen of the jury, testimony tending to show statements made by Captain Jones, which the State contends were made in the fear of his

impending death. The law of North Carolina is that such statements are admissible upon the ground of public policy, one reason being that the victim and the perpetrators of the crime are often the only persons present, and our Court holds that such testimony does not violate the bill of rights, which gives every man the right to confront his accuser, and I instruct you that the rule is that the declarant must have been dead at the time declarations were given in evidence, and that the declarant, at the time he made the declaration, must have been in danger of impending death, and that he must have been in full apprehension of such danger. It is alleged and admitted that Captain Jones was mortally wounded on 5 August and died on 9 August. The State contends that a short time after he was wounded he was in actual danger of death, and that he was in full apprehension of such danger, and that he declared there was no chance for him, and that those responsible for his condition were Collins, Williams, and the Doves. And I instruct you, gentlemen, that you are the judges of the weight you will give to such statement and the credibility you will give the witnesses who testified to it. I further instruct you that it is your duty to receive the statement with care—carefully, but not superstitiously, remembering there was no cross-examination at the time it was made by the deceased." The allusion to the dying declaration could not have been better expressed or stated, and is but one illustration among the several of the intelligent manner in which the cause was considered and tried. The criticisms of the defendants' learned counsel are entirely inadequate to any successful challenge of the correctness of the learned judge's charge as to the dying declaration. They are founded upon pure conjecture as to the probable state of Jones' mind at the time it was made, and as to his semi-consciousness, and his being plied with leading questions, if he made any response to them at all, thus being led easily to his conclusions of fact relating to the circumstances of the assault upon him by the prisoners.

Reviewing the various exceptions taken to the judge's rulings and to his charge, we find none of them that is at all tenable. It would be idle and useless to discuss them *seriatim,* as each and every one of them is manifestly without any solid or genuine merit, and yet we do not feel that in so important a case, involving the lives of three men, and possibly four, we should fail to make some more specific reference to them than we have already done. We will therefore consider the prisoners' exceptions with some more particularity, though not taking them up one by one.

Counsel for the defendants move the Court for a new trial on the ground of newly discovered evidence, because of the fact that one of the witnesses has changed his story of the crime since the trial. If there is any particular virtue in the changed statement of the witness, it should

be addressed to the executive and not to the judicial branch of the Government. However, counsel for the defendants take advantage of the opportunity afforded in a motion for a new trial to present to the Supreme Court, in the form of an affidavit, his version of the whole matter, including the conduct of the court, the conduct of counsel appearing with the solicitor, and the conduct of those in attendance upon the trial. The Assistant Attorney-General directs our attention to the fact, which he affirms and relies on, that some of the statements set out in the affidavits filed with the motion for a new trial, because of after discovered evidence, are new and heard for the first time when this motion for a new trial was entered. It is a well settled proposition of law that this Court will not grant a new trial in criminal cases for newly discovered evidence, to say nothing of reversed evidence. The latest decision reaffirming this doctrine is in *S. v. Jenkins,* 182 N. C., 818. This Court said in that case, by *Adams, J.*: "When the case was called for argument the defendant's counsel filed a motion for a new trial upon the ground of newly discovered evidence. The motion must be denied. In numerous decisions this Court has held that a new trial will not be awarded in a criminal action for newly-discovered evidence; and in *S. v. Lilliston,* 141 N. C., 857, the *Chief Justice* said: 'So that point is settled, if the uniform practice of this Court and its repeated and uniform decisions to the same effect can settle anything.' *S. v. Register,* 133 N. C., 747; *S. v. Turner,* 143 N. C., 641; *S. v. Ice Co.,* 166 N. C., 403." And upon the question of nonsuit, or as to whether there was any evidence to convict, the Court further said: "An issue of fact was thus joined between the State and the defendant, and the court properly submitted to the jury the question of the defendant's guilt. In *S. v. Carlson,* 171 N. C., 823, it is said: 'The motion to nonsuit requires that we should ascertain merely whether there is evidence to sustain the allegations in the indictment. The same rule applies as in civil cases, and the evidence must receive the most favorable construction in favor of the State for the purpose of determining its legal sufficiency to convict, leaving its weight to be passed upon by the jury.'"

Exception one, defendants abandon. Exceptions two, three, four, six, seven, and eight relate to the challenge of jurors for cause by the defendants, for that each of said jurors challenged had served upon the jury within the past two years. This special venire was drawn from the jury box with all the formalities of drawing a regular jury, and were summoned by the sheriff. C. S., 2326, provides that where the name of a juror is drawn from the box, it shall not be ground for challenge that he has served on the jury within two years prior to the court at which the case is tried, and all the decisions of this Court are to the effect that it is no cause for challenge that a special venireman had served upon

the jury within two years. *S. v. Carland,* 90 N. C., 668; *S. v. Whitfield,* 92 N. C., 831; *S. v. Kilgore,* 93 N. C., 533; *S. v. Starnes,* 94 N. C., 973.

In the fourth exception, when the juror Frazelle was challenged for cause on the ground that he had served on the jury within the past two years, and this cause for challenge was disallowed, counsel for the defendants undertook to peremptorily challenge this juror without being required to make it known in open court, so that the other jurors would not be affected or prejudiced by the challenge, if made openly and in their hearing. The court promptly, and properly, we think, stated to the counsel that if he would challenge the juror peremptorily, it must be done in open court, and it would be allowed, but that if counsel did not see fit to make the challenge openly, it would not be allowed. The disagreement between counsel for the defendants and the presiding judge as to what happened is, of course, settled by the finding of the court as to what it was which we have stated.

Exceptions nine, ten, eleven, twelve, fourteen, fifteen, sixteen, seventeen, and eighteen are grouped in defendants' brief as relating to dying declarations. The only objection raised by the defendants in their argument is that the statement of the deceased should not have been received, for that they are very close on the line of demarcation, and that the deceased was speaking, perhaps, unconsciously, and, undoubtedly, responding to leading questions, if he made any responses at all, but the evidence seems to be to the contrary. The deceased had driven his car a mile and a half back to Swansboro, and, before he was taken from his car, he told the witness Midgett that he was beaten all to pieces; that there was no chance for him to live, and that Collins, Williams, and Doves were the responsible parties. There was no evidence that he lapsed into unconsciousness until later on in the night, after which he made no statements whatever. The statements of the deceased as to who shot him come directly under the rules laid down by this Court for the admission of dying declarations. *S. v. Peace,* 46 N. C., 251; *S. v. Whitt,* 113 N. C., 718; *S. v. Quick,* 150 N. C., 820.

The thirteenth exception is complained of on the ground that it is hearsay, but there the witness Midgett was only stating to the witness Freeman what the deceased had said to him, and, if hearsay, it is absolutely immaterial and harmless, because it is merely a repetition of what the witness Midgett had just testified to.

Exceptions 19, 20, 21, 22, 23, 24, 25, and 26, taken to the charge of the court, are grouped in the brief of the defendants and based on the ground that they form expressions of opinion. The judge, more than once in his charge to the jury, tells them that he has no opinion on the facts, and the exceptions above enumerated are taken to the contentions of the State, as given by the court in charging the jury. If the con-

tentions as given by the court were incorrect, and they do not appear so to have been, the counsel for the defendants should have objected at the time, in order to have given the court an opportunity to correct any misstatement of the contentions of the State, if, perchance, he had made any misstatement of the same. All the decisions of this Court are to the effect that when the trial judge is stating the contentions of a party to the jury, the opposite party must object at the time, if they would avail themselves of the objection in this Court, and if the party fails to object at the time, the objection is waived. *S. v. Kincaid*, 183 N. C., 709; *S. v. Montgomery*, 183 N. C., 747; *S. v. Winder*, 183 N. C., 777; *S. v. Sheffield*, 183 N. C., 783; *S. v. Baldwin*, 184 N. C., 789.

The defendants could not have been harmed by the statement of the court that it was alleged, and not denied, that Cyrus Jones was dead, because the evidence of witness after witness was to the effect that he died on Wednesday night, 9 August, and never was any suggestion made by the defendants that he was not dead. Hence, the judge was merely stating a contention of the State, which was uncontradicted by the defendants; and if error at all, it was certainly harmless, and this Court does not concern itself with harmless errors. *Hulse v. Brantley*, 110 N. C., 134; *Alexander v. Trust Co.*, 155 N. C., 124.

Exceptions 27, 28, and 29 seem to be abandoned by the defendants in their brief, and well might they be abandoned because in the court's charge, to which these exceptions are noted, his Honor tracked the law, as repeatedly laid down by this Court, to the very letter.

S. v. Whitson, 111 N. C., 695, answers the 28th exception, and *S. v. Baldwin*, 152 N. C., 828, the 29th and 30th exceptions. In the last named case, *Justice Hoke*, writing the opinion of the Court, says: "Malice may arise from personal ill-will or grudge, but it may also be said to exist (in a legal sense) wherever there has been a wrongful or intentional killing of another, without lawful excuse or mitigating circumstances." This is implied or legal malice.

Exception 31: As to this exception, the court was undertaking to define how malice may be shown, and again the court followed the rules of this Court in defining malice. *S. v. McDowell*, 145 N. C., 563; *S. v. Cameron*, 166 N. C., 379.

Exception 32: This exception seems to be abandoned by the defendants in their brief, and properly so.

Exception 33: In this exception defendants complain for that the court did not go far enough and sufficiently qualify the charge given. This is exactly what the court did do, for, after telling the jury that they should receive the testimony of the defendants and their relatives with caution and scrutiny, the judge uses this language: "If, after such

scrutiny, you are satisfied they are telling the truth, it will then be your duty to give it as much credit as you give the testimony of a disinterested witness."

Exception 34: This exception is properly abandoned.

Exception 35: Here again the defendants complain, for the first time, about the judge stating the contentions of the State. If, in stating these contentions, he erred, which it seems he did not do, the objection should have been made at the time, but none was made. *S. v. Kincaid, supra.*

Exceptions 36 and 37 are abandoned by the defendants, and rightly so.

Exception 38: Here the defendants complain that his Honor erred in failing to tell the jury that the defendants must have been present at the time of the killing, in order to make them guilty of murder in the first degree. If any error here, we think that it was cured by the language of the court used immediately before the language excepted to. Immediately before this exception the court said, "If you find from the evidence, and beyond a reasonable doubt, that the shot which killed Cyrus Jones was fired by Willie Hardison, in furtherance of a plan and design on his part, with malice and with premeditation and deliberation, and that the defendants, or either of them, were (when the fatal shot was fired), then and there present, aiding, encouraging and abetting him, it will be your duty to convict them, or such of them as you find so present, guilty of murder in the first degree."

Exceptions 39 to 46, inclusive, are abandoned by the defendants.

Exception 47: This exception relates to the refusal of his Honor to tell the jury that it was dangerous to convict exclusively on the unsupported testimony of an accomplice. The refusal of the court was on the ground that it was covered in the general charge, and this relates to exceptions 47 and 48. In his Honor's general charge to the jury, he said: "The jury may convict upon the unsupported testimony of an accomplice, though it is dangerous and unsafe to do so, but if the testimony of the accomplice, taken with other facts and circumstances in the case, carries conviction to the minds of the jury, then it is their duty to convict, remembering that the jury must be satisfied beyond a reasonable doubt of the guilt of the defendants before they can convict." What more could he have said, or how better could he have said it?

Exception 49: Here the court gave the instructions asked for by the defendants, and they now complain that he added thereto a correct statement of the law, contending in effect that the trial judge was unfair in correctly stating the law, because everybody knew the defendants were innocent. Counsel for the defendants in this exception, while complaining of the court, seem to lose sight of the fact that the State has some rights as well as the defendants, which should be safeguarded.

Exception 50 and 51: In exception 50 the defendants asked for certain instructions to the jury, and his Honor gave these instructions as set out in exception 51, stripped of surplus verbiage, the language of the court includes everything asked for by the defendants except that it was stated more succinctly and pointedly.

Exception 52: This prayer for instruction was covered in the general charge. His Honor charged the jury at some length on the caution and scrutiny that they should apply to the testimony of interested witnesses.

Exception 53: This prayer for instruction was declined on the ground that it was given in the general charge, but the defendants say they fail to find it in the general charge. But it is there, as will appear in the charge, as set out on page 86 of the record, next to the last paragraph on that page, and is included within the 28th exception of the defendants, which they abandoned in their brief, and is in language as follows: "I further charge you that it is your duty to receive the statements (dying declarations) with care—carefully, but not superstitiously, remembering there was no cross-examination at the time they were made by the deceased."

It appears that the judge not only fully covered the requests of the defendants in his general charge to the jury, but that he correctly stated the law, and conformed, at least substantially, to the language of this Court as used in *S. v. Whitson,* 111 N. C., 695.

Exception 54: This exception is purely formal, and taken to his Honor's refusal to set aside the verdict, and needs no more special reference.

The defendants seem to complain here, and for the first time, that they did not get a fair trial. They seem to believe that the whole case would have been changed and the verdict would have been different if a man by the name of Ramp Jones had not escorted the prisoner, Willie Hardison, from the jail to the court room. The counsel contends that Hardison was under the influence of Jones. While the suggestion is absolutely new, and is heard here for the first time, we call attention to the fact that if they had any ground for it defendants should have complained to the trial judge, and requested proper instructions, whereas no complaint was made, and, so far as the record discloses, the defendants discovered for the first time, after the verdict, that they had not had a fair trial, for the reason indicated.

In the affidavit introduced for the defendants Frank and Fred Dove, and filed in this Court, on the motion for a new trial, they set out the fact that an attorney visited Willie Hardison while he was confined in the jail of Craven County, and interviewed him with reference to what took place at the killing; that Hardison told him, on that occasion, that his clients, Fred and Frank Dove, and the defendant George Williams

were all present and assisted in the killing of the deceased. The witness Hardison could not have been under the influence of Ramp Jones at that time. The witness Hardison only repeated upon the witness stand statements he had previously made when under the influence of nobody, and his testimony in the trial of these defendants was given after he himself had been tried and convicted of murder in the first degree. The Assistant Attorney-General, Mr. Nash (who *always* presents the State's cases, in an exceedingly able, accurate, and most satisfactory manner), contends that it is simply preposterous to advance the theory, at this late day, that the testimony of the witnesses would have been different, if the witness Hardison had been conducted to and from the jail by another deputy sheriff, and that the verdict would also have been reversed. And it does not (at least sufficiently) appear that there would have been any such change in the testimony or the verdict.

The evidence as to the dying declarations of Cyrus Jones having been admitted, it is only necessary to state that it was clearly competent evidence, because at the time the most essential part of it, and also a separate and independent part, was let in, the declarant had stated that he would certainly die, or used equivalent language, if not stronger language, when he said "there was no chance for him" to live, that he had been beaten to death. The judge, therefore, properly ruled in the declaration, although the declarant may afterwards have changed his mind and believed that the doctors might save him. It is evident, though, that Cyrus Jones, at the time when he declared as to the facts and circumstances of the homicide, had abandoned all hope, and that he spoke under the solemnity and in the very presence of impending death, which supplies the usual tests, as to the truth of what he stated, that is, an oath and opportunity of cross-examination by the party against whom his declarations are used.

There was some suggestion in the argument that defendants could not be convicted of murder, as principals, in the first degree, nor as principals in the second degree, as aiders and abettors. This contention was based upon the supposition, clearly not allowable, that the evidence showed that Willie Hardison was the principal, and that the defendants were only accessories before the fact, having beforehand merely advised or counseled the commission of the homicide by him, and not having participated in the actual commission of it, as being present, aiding and abetting, Willie Hardison, the principal. But this position is manifestly without sufficient support in the evidence, when carefully considered, and the learned presiding judge correctly instructed the jury in regard to it. If the State's evidence is credible, and this was for the jury, Hardison and the defendants were all guilty as principals, as they, with premeditation and deliberation, killed and murdered the deceased

in a most cruel and heartless manner, and upon not only a slight, but a frivolous pretext.

It was suggested, but only so, that perhaps Hardison, inspired by a yearning desire to save his own life, testified falsely as to the others, but this is met by what was said by Cyrus Jones, in his dying declarations, and is fully and completely contradicted by it. If he (Jones) told the truth—and he had every reason to tell the truth by reason of his serious situation at the time, and the truth of his words are confirmed by the solemn realization of impending death—there can be no doubt as to the guilt of the prisoner. But any consideration such as suggested by the prisoners is for the jury in impeachment of the State's evidence, or is a matter which should be addressed to the pardoning power and not to us, as we must be governed by the facts as the jury have found them.

There are practically sixty exceptions in this case, many of them of grave importance, requiring full consideration and discussion, and we have, in one way or another, adverted, at least, to those which could not be ignored, and were decisive of the case. It extended the opinion of the court far beyond ordinary limits, but this could not possibly be avoided if the case was given proper and adequate treatment, and is to be fully justified when not only the unusual importance of the case, and the gravity of the questions raised, are taken into account, and also the seriousness of the result, when four lives must be surrendered in the vindication of the law.

We do not recall any other contention of the prisoners that would either excuse, mitigate, or extenuate their crime, and upon a most careful perusal of the whole record, we are satisfied that none such exists.

The prisoners have been tried before an able and learned judge, by a jury fairly and impartially selected according to law, and there is no ground, or even plausible pretext, upon which we can base a reversal or modification of the judgment.

No error.

STATE v. ROBERT WHEELER.

(Filed 21 March, 1923.)

Appeal and Error—Record Proper—Case on Appeal—Conflict—Criminal Law—Jury of Twelve—Misdemeanor—Waiver.

The record proper in a case on appeal "imports verity," and will control when there appears to be conflicting statements between such record and the statement of the case on appeal; and where on the statement in the case on appeal from a criminal case charging a misdemeanor, the record proper states the case was tried by twelve jurors who rendered an unani-

mous verdict against the defendant, he may not show by the case on appeal that he was denied his constitutional right to a trial by twelve jurors. *Semble*, the defendant tried for a misdemeanor may consent to try his case with eleven jurors when one of them has become sick, or rendered incapable of continuing to serve.

WALKER and ADAMS, JJ., concur in result.

APPEAL by defendant from *Lyon, J.*, at October Term, 1922, of WAKE. Verdict of guilty. From the judgment thereon the defendant appeals.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. M. Person and O. F. Johnson for defendant.

CLARK, C. J. The only error assigned is that the verdict was not rendered by a jury of twelve jurors. The record recites: "The following jurors, to wit, (1) F. H. Scarboro, (2) Willis Ray, (3) W. T. Bower, (4) J. S. Johns, (5) J. E. Raines, (6) J. A. Woodard, (7) T. W. Mooneyham, (8) J. J. Olive, (9) J. S. Pollard, (10) F. A. Bunn, (11) W. A. Watson, (12) T. E. Buchanan, were chosen, tried, sworn and impaneled to speak the truth of and concerning the premises of the said bill of indictment specified, who said upon their oath that the said Robert Wheeler was guilty thereof in manner and form as charged in the bills of indictment."

The statement of the case on appeal states, however, as follows: "During the course of the trial, court adjourned for the day after argument had been made by W. M. Person and O. F. Johnson of counsel for defendant and before the conclusion of the argument, the next morning only eleven jurors were present, one of them being sick and unable to attend. The court inquired of the counsel for the defendant, who was then present, to wit, O. F. Johnson and L. H. Turner, if they would consent to continue the trial of the case with the eleven jurors, waiving the absence of the sick juror. The counsel for the defendant, O. F. Johnson and L. H. Turner, consented to do so, and the argument was concluded by L. H. Turner in behalf of the defendant and the solicitor in behalf of the State."

There was no motion made to amend the record proper to conform to this statement of the case, and by the uniform decisions of this Court the record proper "imports verity," and when there is conflict between the record proper and the statement of the case the record must be taken as absolutely true.

It has been uniformly held in this Court that "where the record proper differs from the case on appeal the former governs." *Ladd v. Teague*, 126 N. C., 549; *S. v. Truesdale*, 125 N. C., 696 (which was a

capital case); *Sutton v. Phillips,* 117 N. C., 230; *Threadgill v. Comrs.,* 116 N. C., 616; *McDaniel v. Scurlock,* 115 N. C., 295; *S. v. Ramsour,* 113 N. C., 642; *S. v. Carlton,* 107 N. C., 957; *Bowen v. Fox,* 99 N. C., 127; *McCanless v. Flinchum,* 98 N. C., 388; *McNeil v. Lawton,* 97 N. C., 16; *Adrian v. Shaw,* 84 N. C., 832; *S. v. Keeter,* 80 N. C., 472; *Farmer v. Willard,* 75 N. C., 401, and other cases since down to *Southerland v. Brown,* 176 N. C., 190, where it is stated to be settled law. The defendant cannot be allowed to take the advantage of any alleged defect in the trial which is contradicted by the record.

If, in fact, after the evidence was all in and part of the argument made, the trial with the consent of defendant proceeded without the presence of the absent juror, and if there was any untoward result to him caused thereby, the defendant, who was present in person as well as by counsel, assented to this course; and if he suffered any damage thereby it was his duty then and there to have moved the court to amend the record so as to show this, and that notwithstanding this he had assented to the trial proceeding with the eleven jurors. On the contrary, the defendant and his counsel made no motion to amend the record, and let it come up to this Court as an absolute statement of the fact, for the record "doth import verity" that in fact twelve jurors rendered the verdict, and he is estopped now to assert the contrary. Parties cannot thus hold the proceedings of the court in contempt by averring contrary to the solemn recitals of the record proper duly certified with their knowledge and without any objection.

In *Covington v. Newburger,* 99 N. C., 523, the Court held: "This Court cannot permit the record proper to be varied or amended by adding thereto matters suggested to the Court upon affidavit. Only questions presented in the record can be considered."

The record proper certified up to this Court without any attempt on the part of the defendant present in person or by counsel to make correction therein must be taken as an absolute verity. If this were not true there would be endless confusion and nothing would be certain as to what transpired in the court below. But if it had appeared in the record itself that in fact the trial proceeded for a misdemeanor with less than twelve men, it is the generally accepted rule, as follows, "While in cases of felony, the constitutional right to be tried cannot be waived by the accused, the rule is different on trials of misdemeanor." 1 Thompson on Trials, 6, citing *Commonwealth v. Daily,* 66 Mass. (12 Cush.), 80, where it was held, "Upon a trial for misdemeanor, if the defendant's counsel consent that one juror may be withdrawn, and the case proceeds with the remaining eleven, a verdict of guilty will not be set aside." The opinion in that case is by *Shaw, C. J.,* and is a very learned and able opinion and seemingly conclusive.

In this State we have held that while a party can plead guilty, yet if he raises an issue by pleading not guilty it cannot be passed upon by the judge, but must be submitted to the jury. But we have no case which has held that the defendant cannot in an emergency occurring—for instance, by the sickness or death of a juror—agree that the verdict may be rendered by less than twelve jurors, nor forbidding the acceptance of a verdict otherwise than unanimous on indictments for misdemeanor. The Constitution guarantees the right of trial by jury, but does not forbid such consent verdict by a lesser number.

Our Court has held in *S. v. Rogers,* 162 N. C., 656, that such consent verdict may not be taken on a conviction for felony. In that case the indictment was for murder, and the conviction was for manslaughter. On indictments for misdemeanor and in civil cases it has been by no means unusual in our courts to save the expense of a mistrial or a new trial, whenever the party was disposed and would agree by himself and his counsel, to waive the requirement of a unanimous verdict of twelve men, and there has been no decision in this Court forbidding this being done. The party, of course, has the right to appeal in such cases as in all others for exceptions taken for errors in the trial.

In *S. v. Stewart,* 89 N. C., 564; *S. v. Holt,* 90 N. C., 749; *S. v. Scruggs,* 115 N. C., 805, it was held that a jury trial cannot be waived in a criminal case, but in no case have we held that a verdict may not be rendered by consent of defendant by less a number than twelve in a misdemeanor or a civil case, and there is no reason why we should extend the doctrine in this case.

The defendant has a constitutional right to a speedy trial by jury. Yet he waives this provision by obtaining a continuance.

A plea of guilty dispenses with a jury trial altogether. There is no reason, therefore, why defendant cannot agree to accept the verdict of eleven jurors in an indictment for misdemeanor when his counsel and himself think it for his interest to do so, especially when this is done with the consent of the court and the solicitor representing the State. We have not held this cannot be done in misdemeanors heretofore. It is true it was so held by a divided Court in *S. v. Rogers,* but there the indictment was for a capital offense and the conviction was for felony. In this case the conviction was of misdemeanor, and there is nothing to indicate that the defendant suffered from any prejudice from the conduct of himself or his counsel in proceeding with the trial in the absence of the other juror, and the defendant ought not to obtain any benefit from a verdict by less than unanimity rendered by his consent.

The text in Thompson on Jury Trials, *supra,* also cites *S. v. Borowsky.* 11 Nev., 119. "A defendant indicted for misdemeanor may be tried

by a jury of eleven men if he consents thereto, and such consent is not a waiver of the jury trial," though it would be otherwise in a case of felony. The same is held in *S. v. Cox,* 8 Ark. (3 Eng.), 436.

In *Tyra v. Commonwealth,* 59 Ky. (2 Metc.), 1, it is held, "On a trial for misdemeanor the defendant can be tried by less than twelve jurors." And to the same purport, *S. v. Van Matre,* 49 Mo. (8 Post), 269.

The whole subject seems to be fully and sensibly summed up in 16 R. C. L., 217, where it is set out with abundant authority: "As a general rule, jury trials being a mere constitutional privilege, it may be waived, except in trial for capital offenses"; and on p. 219, it is held that, although there is a diversity of decisions on the point, one charged with the commission of felony cannot on pleading not guilty waive trial by jury, though numerous authorities are cited to the contrary. Among the cases whose reasoning on this point is most worthy of consideration are: *S. v. Kaufman,* 51 Iowa, 579; *Commonwealth v. Daily,* 66 Mass., 80, *supra; Murphy v. Commonwealth,* 58 Ky., 365; *S. v. Sackett,* 39 Minn., 69; *S. v. White,* 33 La. Annual, 1219.

In this State the subject of the origin of jury trial and the right to waive the same was fully discussed in *S. v. Rogers,* 162 N. C., 656. That case was an indictment for murder, and the Court held, "When the defendant pleads not guilty in such a case as that he cannot waive a trial by jury of twelve men." This is in accord with the authorities above cited from other States, but we have no case which holds that in trials for misdemeanor the defendant cannot agree that the verdict may be rendered by a jury of less than twelve men or dispense with the requirement of unanimity. However, we place this decision squarely upon the ground that the record, which is not impeached, states that the trial and conviction was by twelve jurors whose names are duly recited, and the record must prevail over any contrary statement appearing in the case on appeal.

No error.

WALKER and ADAMS, JJ., concur in result.

STATE v. EUGENE FOSTER.

(Filed 21 March, 1923.)

1. **Intoxicating Liquor—Spirituous Liquor—Evidence—Possession—Prima Facie Case.**

Where the defendant is being tried for violating our prohibition law, and there is evidence that a quart of whiskey had been found in a trunk in the defendant's dwelling with some women's clothes, to explain the

presence of the clothes in the trunk and to identify the trunk as that of the plaintiff, it is competent for a witness to testify that the defendant was unmarried, but lived there with a woman.

2. Appeal and Error—Questions and Answers—Objections and Exceptions.

Where the answer to a question of the witness is proper, but the witness had added information that was incompetent evidence, the appellant should object to the incompetent part of the answer.

3. Criminal Actions — Instructions — Prejudice—Intoxicating Liquors—Spirituous Liquors.

An instruction upon a trial for violating our prohibition laws, that it required no more evidence to acquit or convict than in any other criminal action, is in effect a caution to the jury not to be prejudiced in an action of this kind, and is not erroneous.

4. Statutes—Repealing Laws—Spirituous Liquors—Intoxicating Liquors.

The recent Turlington Act repeals all conflicting laws and makes the possession of any intoxicating liquors for the purpose of sale unlawful, unless such liquors are for the private use and in the residence of the possessor: *Held*, our prior statute making the possession of one quart thereof prima facie evidence of the purpose of unlawful sale is not in conflict therewith or repealed thereby.

5. Same.

The repealing clause of a statute applying to laws in conflict therewith cannot be construed as impliedly repealing all previous laws on the subject, but only to the extent they are conflicting.

6. Criminal Law—Statutes—Prospective Effect—Prior Offense—Intoxicating Liquors—Spirituous Liquors.

Where the defendant is being tried under a criminal statute, in this case relating to the prohibition law, he may not be acquitted under the provisions of a later prohibition statute, in effect from and after its ratification, when the offense charged was committed before that time.

7. Statutes—Repeal—Interpretation—Proposed Amendments.

The fact of an amendment to a bill being passed by one branch of legislation but rejected by the other cannot affect the interpretation of the act.

8. Intoxicating Liquors—Spirituous Liquors—Possession—Defenses—Exceptions—Proof.

Where the defendant, charged with the violation of our prohibition law, seeks to defend himself under the provisions of the Turlington Act, allowing the possession of intoxicating liquors in his house for his own purposes, he must plead and show that the liquor was for the purpose allowed by the act.

STACY, J., concurs in the result.

APPEAL by defendant from *Cranmer, J.*, at January Term, 1923, of FRANKLIN.

The defendant was convicted of having liquor in his possession for the purpose of sale, and also for receiving more than one quart at a time, and appealed.

The defendant's house was searched by officers with a search warrant. They found a quart of whiskey in a trunk in which were some woman's clothes; a gallon of whiskey in some cotton; one gallon more in a shed; two empty five-gallon jugs with the smell of whiskey and a quart pot and a funnel. This evidence was introduced as tending to show that the defendant had not only received more than the legal quantity, but had it in possession for the purpose of sale. He denied that the whiskey was his or that he had had anything to do with making or selling it. There was evidence of his good character and also of his bad character.

Verdict of guilty and judgment and appeal by defendant.

Attorney-General Manning, Assistant Attorney-General Nash, and Heriot Clarkson for the State.

W. H. and Thomas W. Ruffin for defendant.

CLARK, C. J. The first exception was to the question and answer, "Is the defendant married?" The witness said he "was not; that a woman stayed with him." The question, if it had been merely irrelevant, was not ground of error, but it was competent as tending to explain why the quart of whiskey was in the trunk in which there were a woman's clothes. The addition made in the reply was not called out by the question, for the witness could have simply answered Yes or No. The defendant did not ask to have it struck out.

The second exception was to this part of the charge of the court: "It does not require, gentlemen of the jury, any more evidence or any less evidence, or any different kind of evidence, to convict or acquit one charged with the violation of the prohibition law than it does to convict or acquit one charged with the violation of any of the criminal statutes of the State, and the jury that requires more or less or any different kind of evidence is not an honest jury."

We cannot see that this in any wise could prejudice the defendant. The court was simply instructing the jury, in his own way, against permitting any prejudice arising out of the enforcement of the prohibition law to affect them in considering the case. It was as much in behalf of the defendant as in behalf of the State.

The point chiefly pressed on the appeal was that the defendant was indicted for having two and one-half gallons of whiskey in his possession for purposes of sale and receiving more than one quart of liquor, to wit, five gallons malt liquor, both about 24 December, 1922, and that while the appeal was pending the Legislature passed "An act to make the State law conform to the National law in relation to intoxicating liquors," known as the "Turlington Act," and that section 10 of that act provides, "From and after the ratification of this act, the possession of

liquor by any person not legally permitted under this act to possess liquor shall be *prima facie* evidence that such liquor is kept for the purpose of being sold, bartered, exchanged, given away, furnished or otherwise disposed of in violation of the provisions of this act. But it shall not be unlawful to possess liquor in one's private dwelling while the same is occupied by him as his dwelling only, provided such liquor is for use only for the personal consumption of the owner thereof and his family residing in such dwelling and his *bona fide* guests when entertained by him therein." And section 28 provides, "All laws in conflict with this act are hereby repealed, but nothing in this act shall operate to repeal any of the local acts of the General Assembly of North Carolina prohibiting the manufacture or sale or other disposition of any liquor mentioned in this act, or any laws for the enforcement of the same, but all such acts shall continue in full force and effect and in concurrence herewith. An indictment for prosecution may be had either under this act or under any local act relating to the same subject." Section 29 provides: "If any provision of this act shall be held invalid it shall not be construed to invalidate other provisions of this act." This act was ratified 1 March, 1923, and section 30 provides that it shall be in force from its ratification. There was a general verdict of guilty.

The defendant filed a certificate that subsequent to the passage of the act the Senate passed an amendment to the same excepting all pending indictments, prosecutions and cases, from the provisions of the act, but that the House did not concur in the amendment, and failed to pass the same, and the defendant's counsel insisted that the failure to pass this amendment was a declaration by the House that all pending indictments and prosecutions were based upon laws in conflict with the provisions of this act, and hence that all pending indictments should be quashed.

It is well said, 25 R. C. L., p. 912, "The common formula in a repealing clause that 'all acts and parts of acts in conflict herewith are hereby repealed' implies very strongly that other acts on the same subject are not repealed."

In Black on Interpretation of Laws, 579, p. 351, it is said, "Repeals by implication are not favored. A statute will not be construed as repealing prior acts on the same subject (in the absence of express words to that effect) unless there is an irreconcilable repugnancy between them, or unless the new law is evidently intended to supersede all prior acts on the matter in hand and to comprise in itself the sole and complete system of legislation on that subject."

The legislation in this case justified the conviction of the defendant on the charge in the indictment, and there is nothing in the Turlington Act which is in conflict therewith. The fact that the new act is more extensive and more far-reaching in its requirement does not repeal the

former act, either expressly or by any implication. Still less could we hold the failure of the House to adopt the Senate provision (intended evidently to "exclude a conclusion" that the new act repealed all former provisions) had the effect to repeal all former statutes on the subject. It would be more reasonable to assume that the House deemed the enactment of the Senate provision unnecessary.

We cannot consider the inaction of the House in any aspect as an adjudication that the later act repealed the provisions of the statute under which the defendant was convicted. Moreover, section 30 of the Turlington Act declares it shall be in force from and after its ratification. It was ratified 1 March, 1923.

In *S. v. Mull,* 178 N. C., 748, there was no evidence tending to show any sale of spirituous liquors at any other time than on 20 December, 1918, and there was no evidence tending to show any sale by the defendant subsequent to 23 January, 1919. At the close of the evidence for the State the defendant moved for judgment as of nonsuit upon the ground that under the act ratified 23 January, 1919 (ch. 2, Public-Local Laws 1919), making such sale in Burke County a felony, the statutes in force prior to that date were repealed, and hence that defendant could not be convicted under said prior statutes and could not be convicted under the act of 23 January, 1919, as it was enacted after the commission of the alleged offense.

Section 1 of said chapter 2 was as follows: "Any person who shall manufacture or sell spirituous liquors shall be guilty of a felony, and upon conviction for first offense shall be fined or imprisoned, in the discretion of the court"; and section 8 provided, "All laws and clauses of laws in conflict herewith are hereby repealed"; and section 9 provided that the act "shall be in force from and after its ratification," which was 23 January, 1919.

The Court, in *S. v. Mull,* after quoting *Walker, J.,* in *S. v. Perkins,* 141 N. C., 809, said: "This unanswerable argument applies to this case, where it is specified that the act is to take effect 'from and after its ratification' (23 January, 1919), and therefore prospectively only. There can be no doubt of the intention of the Legislature in the present case, for the title of ch. 2, Public-Local Laws of 1919, is 'An act to amend the prohibition law and to provide for the better enforcement of the same in Burke County.' There is certainly no intention in this nor in the body of the act to turn loose all those who had violated the law in force prior to the passage of the act, but to increase the penalty and to make prohibition more effective."

In the present case the act now in force was to take effect on 1 March, 1923, and in no wise affected the crime which the defendant committed

on 24 December, 1922, and for which he was convicted, of having in possession more than one gallon of liquor for the purpose of sale and receiving the same.

Under the present statute it is an offense to have in possession any quantity of liquor whatever for the purpose of sale, and this is in no wise in conflict with the provision in force on 24 December, 1922, even if thereunder the prima facie presumption of the purpose to sell would not have arisen unless such quantity was more than one gallon. In fact, C. S., 3378 and 3379, making it unlawful to sell, or have or keep in possession for the purpose of sale, spirituous liquors is substantially the same as the "Turlington Act."

The defendant contends that the new act prohibits the receiving of *any* intoxicating liquor, while under the former act it was lawful to receive as much as a quart, and even more than a quart if received at different times; but as the new act did not take effect until 1 March the defendant was not tried under it, and cannot complain that the prospective change was made prohibiting *any* to be received after 1 March, as already stated.

The defendant also contends that under the old law possession of more than a gallon of liquor was prima facie evidence of possession, while under the new law the possession of any quantity of liquor is prima facie evidence of possession for sale, provided not in a private dwelling of the accused. The same observation applies to this also. The defendant was not affected in his trial by the new act, which did not go into effect until 1 March, and he could not plead, and in fact there was no evidence if so pleaded, that he had liquor in his house for his own purposes, for his own testimony was that he did not have any at all.

We cannot see that the defendant has any cause of complaint. He was tried under the old law and duly convicted.

No error.

STACY, J., concurs in result.

STATE v. JIM MILLER.

(Filed 21 March, 1923.)

1. Homicide—Murder—Premeditation—Deliberation—Evidence.

Where there is evidence upon a trial for murder that the deceased pursued the prisoner and accused him of stealing his corn, and rode in the latter's wagon with him for the purpose of going before a magistrate, and before reaching their destination the prisoner killed the deceased by

pistol shots, and his dead body was found along the road where the prisoner had left him, evidence is competent that upon meeting with the deceased he had uncovered the prisoner's wagon body and found therein corn, hay, and whiskey as tending to disclose conditions that would bear upon the questions of premeditation and deliberation intervening between the time of their meeting and that of the homicide, and sustain a verdict of murder in the first degree.

2. **Homicide—Murder—Self-defense—Evidence.**

Where self-defense is relied upon in the trial for murder, with the prisoner's evidence that he had killed the deceased when the latter had attacked him with a knife, it is competent for the State to show in rebuttal by its witnesses who had examined the body shortly after the homicide that the deceased had no weapon except a pocket knife, which was found closed in the pocket of the deceased.

3. **Homicide — Murder — Instructions — Premeditation — Deliberation—Cause of Death.**

Where the prisoner has been convicted of murder in the first degree, his exception that the charge failed to instruct the jury that it was necessary for the death to have resulted from the premeditation and deliberation of the prisoner, cannot be sustained, when it appears that the jury was correctly instructed as to the principles of murder in the first degree, that the burden was placed on the State to establish guilt beyond a reasonable doubt, and that the death must have resulted from the preconceived purpose to commit the homicide.

4. **Homicide—Murder—Instructions—Evidence—Request for Instructions—Appeal and Error—Objections and Exceptions.**

The prisoner, convicted of murder in the first degree, may not sustain an appeal by exception to the charge upon the element of malice on the ground that the principles of law were not applied to every phase of the evidence, where the instructions correctly stated the principles generally applicable, and the prisoner has not offered prayers for special instructions on the subject of his exceptions.

5. **Homicide — Manslaughter — Malice — Murder—Evidence—Burden of Proof—Justification.**

The unlawful killing of a human being is at least manslaughter, and with the added element of malice it becomes at least murder in the second degree. When the killing with a deadly weapon is shown or admitted, the burden is on the prisoner to show to the satisfaction of the jury such matters as will reduce the offense to manslaughter or excuse the homicide.

6. **Appeal and Error—Objections and Exceptions—Instructions—Contentions.**

An exception to the manner in which the trial judge stated the defendant's contentions is not available to him when taken for the first time after verdict.

7. **Appeal and Error—Homicide—Presence of Militia—Prejudice.**

Held, under the circumstances of this case, the appellant from a judgment of murder on the first degree was not prejudiced by the presence of a detachment of State militia in the courtroom when the verdict was returned.

STATE *v.* MILLER.

APPEAL by prisoner from *Calvert, J.*, at January Term, 1923, of LENOIR.

Criminal action. The prisoner was prosecuted for the murder of one John Sutton. The homicide occurred on 29 September, 1922, about 7 p.m. The deceased, believing the prisoner had stolen corn from his field, got Arthur Sutton, his cousin, to take him in his car in pursuit of the prisoner, who was driving a one-horse wagon along the public highway in the direction of Kinston. The car soon overtook him, and the deceased went to the side of the wagon and asked the prisoner what he had in it. The answer was, "It is none of your business." The deceased then pushed back some hay that was in the wagon, laid his hands on some corn that had been underneath the hay, and asked the prisoner where he got it. The prisoner said, "From Dary Williams," and the deceased replied, "No, you got it out of my field." The deceased then directed Arthur Sutton to drive on to Kinston and get an officer. After Arthur left, the deceased got in the wagon with the prisoner and told him to go on. The deceased sat in the wagon at the left of the prisoner. After the car had gone the prisoner, with the deceased by his side, went on towards Kinston. After going about two or three hundred yards on the road they got into the highway leading towards Kinston and went about one hundred and fifty or two hundred yards further when the prisoner drew a pistol from his pocket and fired four shots at the deceased. Three shots took effect and death followed almost instantly. Soon afterwards the body of the deceased was found in the road. The deceased at the time had on overalls and had no weapon about his person. When his body was examined by the coroner a knife was found in the pocket of the deceased, but it was not open.

After the homicide the prisoner escaped and was afterwards arrested in Baltimore and brought back to Kinston for trial. Sheriff Taylor testified that the prisoner made a voluntary statement and admitted that he had shot and killed the deceased with a pistol. In this statement the prisoner said that after the deceased got into his wagon they engaged in an "argument," and that the deceased had his knife and "made a grab at him and he shot him, and he fell off the wagon." He also said that the deceased "whacked him across the shoulder" and cut his shirt, but not his flesh.

After the homicide was committed the prisoner drove his wagon back of Duff Humphrey's house in the woods, where it was afterwards found. In the wagon there were about eighteen gallons of whiskey and a small quantity of corn.

The prisoner was convicted of murder in the first degree, and from the judgment and sentence of death he appealed to the Supreme Court.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John R. Denton for the prisoner.

ADAMS, J. The gravity of the judgment pronounced has called for a close and careful scrutiny of the entire record, to the end that the prisoner's exceptions be judicially determined and his legal rights fully protected. Such inspection we have endeavored to bestow, and have been unable to discover in the trial any error that will warrant referring the case to another jury or interfering with the judgment of the court.

The circumstances attending the homicide are free from complication. The prisoner was driving his wagon on the highway; he was overtaken, or met, by the deceased and charged with larceny; the deceased got in the wagon and took a seat on the left side of the prisoner; an "argument" followed and the prisoner fired four shots in rapid succession, killing the deceased, whose body soon thereafter was found in the road. No novel question is presented and no extended discussion is required.

Exceptions 1, 4, 5: The prisoner's objection to evidence tending to show the contents of the wagon-bed—hay, whiskey, and a little corn—is without merit. When the deceased and Arthur Sutton overtook, or met, the prisoner the deceased displaced a part of the hay and found corn which he said had been stolen from his field. If evidence, when offered, is competent for any purpose it should not be excluded; and here the evidence objected to was competent, not only on the question of the prisoner's motive in firing the fatal shots, but on the question of his premeditation and deliberation. It tended to disclose conditions, all of which were known to the prisoner, and some of which were known to the deceased during the time that intervened between their meeting and the commission of the homicide. *S. v. Goff*, 117 N. C., 756; *S. v. Rose*, 129 N. C., 575; *S. v. Wilcox*, 132 N. C., 1143.

Exceptions 2, 3: Arthur Sutton testified that after going in search of the officer, he returned to the scene of the homicide and examined the body of the deceased, not very closely, it is true, and found that he was not armed; and C. T. Savage testified that when he went there he found nothing. To the admission of these statements exceptions were entered of record.

The prisoner told the sheriff that the deceased while in the wagon assaulted him with a knife; that the deceased "had his knife and made a grab at him, and he shot him." He did not say the deceased had a pistol. The court was alert to permit the jury to consider any evidence of an assault upon the prisoner by the deceased with a knife, and instructed them in the law both of manslaughter and of self-defense. Since the prisoner did not pretend that the deceased had a pistol, in

what way could the admitted evidence be prejudicial? In any event, it was immaterial; and, as Chamberlayne pertinently remarks, "Even where the higher court feels that error has been committed in admitting certain evidence, it will not, as a rule, find prejudice where the evidence admitted was entirely irrelevant, *i. e., immaterial.* It is obviously difficult to predicate prejudice upon the admission of irrelevant evidence entirely without probative effect." Modern Law of Ev., sec. 174. And substantially the same proposition has been approved in our decisions time after time. *Carter v. R. R.,* 165 N. C., 249; *Penland v. Barnard,* 146 N. C., 379; *Hosiery Mills v. Cotton Mills,* 140 N. C., 452.

Exceptions 7, 8: Exception was taken to his Honor's definition of deliberation and premeditation, which was in these words: "Deliberation means to think about, to revolve over in one's mind; and if a person thinks about the performance of an act and determines in his mind to do that act, he has deliberated upon the act. Premeditation means to think beforehand, think over the matter beforehand; and where a person forms a purpose to kill another and weighs this purpose in his mind long enough to form a fixed design to kill at a subsequent time, no matter how soon or how late, and pursuant to said fixed design kills said person, this would be a killing with premeditation and deliberation. . . . In order to constitute deliberation and premeditation, something more must appear than the prior existence of actual malice, or the presumption of actual malice, which arises from the use of a deadly weapon. Though the mental process may require but a moment of thought, it must be shown so as to satisfy the jury beyond a reasonable doubt that the person had weighed and balanced the subject of killing in his mind long enough to consider the reason or the motive that impelled him to act, as to form a fixed design to kill in furtherance of such purpose or motive."

These exceptions are based on the proposition that the court did not specifically instruct the jury that in order to convict the prisoner of murder in the first degree they must find the homicide to have been the direct consequence of premeditation and deliberation. The misconception is in failing to distinguish between a definition of the words "premeditation and deliberation" and facts that are necessary to constitute murder in the first degree. Here his Honor was merely defining these terms, and in another part of his charge he gave the following instruction as to murder in the first degree: "Now the burden of proof is upon the State—that is, before you can return a verdict of "Guilty of murder in the first degree," you will have to find from the evidence and beyond a reasonable doubt that the prisoner killed the deceased not only with malice, but premeditation and deliberation, and the court charges you that if you should find beyond a reasonable doubt that prior to the time

the prisoner killed the deceased he formed a fixed purpose in his mind to kill him, and that pursuant to that purpose he did kill the deceased because of the purpose in his mind, then the court charges you that the prisoner will be guilty of murder in the first degree, and it would be your duty to so find."

The exceptions must be overruled. *S. v. Spivey*, 132 N. C., 989; *S. v. Daniel*, 139 N. C., 549; *S. v. Hunt*, 134 N. C., 684; *S. v. Norwood*, 115 N. C., 790; *S. v. McCormac*, 116 N. C., 1033; *S. v. Covington*, 117 N. C., 834.

Exception 9 is addressed to the instruction as to the law of manslaughter, the particular impeachment being that the court did not apply the law to the evidence. The definition of the word "malice" was given in connection with the explanation of the several degrees of felonious homicide, and the contentions of the State and of the prisoner were reviewed by the court. After stating the prisoner's position with respect to the alleged assault by the deceased with a knife, and after telling the jury that if the prisoner did the killing without malice, but not in self-defense, he would be guilty only of manslaughter, his Honor gave the additional instruction that if the prisoner committed the homicide by reason of anger suddenly aroused, the crime would be nothing more than manslaughter. Of the latter instruction the prisoner assuredly has no just cause to complain. If, as now suggested, he desired that the law should be particularly applied to any special phase of the evidence, it was incumbent upon him to make the request by special prayers for instructions. *S. v. Merrick*, 171 N. C., 795; *S. v. Thomas*, 184 N. C., 757.

Exception 11: In *S. v. Fowler*, 151 N. C., 732, *Brown, J.*, said: "An unlawful killing is manslaughter, and when there is the added element of malice it is murder in the second degree. When the defendant takes up the laboring oar he must rebut both presumptions—the presumption that the killing was unlawful and the presumption that it was done with malice. If he stops when he has rebutted the presumption of malice, the presumption that the killing was unlawful still stands, and unless rebutted the defendant is guilty of manslaughter. This is a fair deduction from the cases in this State. *S. v. Hagan*, 131 N. C., 802; *S. v. Brittain*, 89 N. C., 501, 502." And in *S. v. Lane*, 166 N. C., 333, it was held that the burden is on the prisoner to establish circumstances in excuse or mitigation to the satisfaction of the jury unless they arise out of the evidence against him. See, also, *S. v. Brinkley*, 183 N. C., 720, and *S. v. Johnson*, 184 N. C., 637. The presiding judge charged the jury in accordance with these decisions, but it is argued for the prisoner that the jury may have inferred that he was not entitled to the benefit of the instruction because he had offered no evidence; but this

argument is precluded by the court's application of the instruction to the facts and circumstances which had been disclosed by the evidence, and on which the prisoner relied.

Exceptions 12, 13: The prisoner excepted also to the manner in which the court stated certain of the prisoner's contentions, but this exception is not now available, for the reason that such objection cannot first be made after the verdict is returned. *Phifer v. Comrs.*, 157 N. C., 150; *S. v. Tyson*, 133 N. C., 692; *S. v. Davis*, 134 N. C., 633; *S. v. Kincaid*, 183 N. C., 709.

Exceptions 14, 15: At the request of the local authorities and by permission of the Governor, a detachment of the State militia were in the courtroom when the verdict was returned. There is no suggestion that the jury knew they were there before this time, and so far as the record discloses there is not a reasonable probability that their presence could have influenced the verdict in any respect. If there had been we are assured that the cautious and discerning judge who presided at the trial would have given the matter careful thought when considering the prisoner's motion for a new trial.

A critical review of the record does not disclose reversible error.

No error.

STATE v. JIM WILLIAMS.

(Filed 4 April, 1923.)

1. Criminal Law — Indictment — Rape — Evidence—Verdict—Degree of Crime.

An indictment for any offense against the criminal law includes all lesser degrees of the same crime, known to the law; and conviction may be had of the lesser offense when the charge is inclusive of both, C. S., 4640; therefore, on an indictment for rape, when the crime charged includes an assault against the person, and other lesser crimes, the jury may acquit of the felony and find a verdict of guilty of an assault should the evidence warrant such finding. C. S., 4639.

2. Same—Instructions—Appeal and Error.

When upon a trial for rape there is evidence that the defendant accomplished his purpose by overcoming the resistance of the prosecutrix by force and coercing her, with the use of a pistol, to submit to his embraces, it is the duty of the court to charge on the supporting evidence as to the lesser degrees of the crime, *i. e.*, assault with intent, assault with a deadly weapon, assault upon a female, etc., and his failure to do so upon defendant's request or otherwise constitutes reversible error. C. S., 4639, 4640.

3. Same—Prejudicial Error.

The error of the judge in failing to charge on the supporting evidence, upon the lesser degree of the crime of rape, under a charge thereof in the indictment, is not cured by the verdict finding that the defendant was guilty of the greater degree of the crime charged in the indictment. C. S., 2639, 4640.

APPEAL by defendant from *Connor, J.*, at November Term, 1922, of NEW HANOVER.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. F. Jones and A. G. Warren, Jr., for defendant.

WALKER, J. The defendant was convicted of the crime of rape at the November Term, 1922, of the Superior Court of New Hanover County, Judge Connor presiding, and from the judgment upon such conviction appealed to this Court.

The State's evidence, if believed, showed beyond any doubt the commission of the crime of rape, all the elements showing in this testimony. The defendant admitted the act, denied any force, and claimed that the act was done with the consent of the prosecuting witness. The additional and supporting evidence of the State and that of the defendant concerned only the corroboration, or confirmation, of the prosecuting witness on the one hand and of the defendant on the other. While the prosecuting witness's testimony showed, if believed, that the defendant accomplished his purpose by the use of a pistol or gun, yet the defendant not only denied the use of a pistol or gun, but alleged that it was not in the possession of the defendant at the time the act was committed, and his evidence perhaps tended to show that this was true, and to support his contention.

The defendant's only exception in the case arises from the failure of his Honor to give to the jury special instructions requested in writing by the defendant's counsel, as follows: "This is an indictment for rape, which crime includes an assault against a female; and under the laws of North Carolina there are five verdicts that may be returned by the jury under this indictment: first, rape, the crime charged in the bill of indictment; second, assault with intent to commit rape; third, assault with a deadly weapon; fourth, assault upon a female, the defendant being a male over eighteen years of age; and, finally, 'Not guilty,' according as the jury may find."

This instruction the judge refused to give, and the prisoner excepted, but the court gave the following instruction: "In this case the State alleges that this defendant committed an act of sexual intercourse with

the prosecuting witness, Marjorie Bannerman. This allegation is admitted by the defendant. The State alleges that this act of intercourse with Marjorie Bannerman was without her consent, that it was against her will, and that it was accomplished by means of force and violence exerted by this defendant. This the defendant denies. I instruct you that if you find from the evidence in this case, and beyond a reasonable doubt from this evidence, that this defendant had an act of sexual intercourse with Marjorie Bannerman against her will, by means of force and violence, then, gentlemen, he is guilty as charged in the indictment, and your verdict should be guilty. Unless you so find, that is, unless you find not only that he had an act of sexual intercourse, but also find that such act was against her will and was accomplished by means of force and violence, it would be your duty to return a verdict of not guilty."

Consolidated Statutes, sec. 4639, so far as material to this point, is as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and find a verdict of guilty of assault against the person indicted if the evidence warrants such finding."

The State contends that while the evidence of the prosecuting witness showed an assault with a deadly weapon upon the prosecutrix, yet this very assault was part of the means used by the defendant to force her. The defendant denies the use of the deadly weapon; he denies the use of any force at all, but sets up the willingness and consent of the woman in justification and defense of his act. There is, therefore, in this case, says the State, no evidence which would warrant the judge in giving the charge requested by the defendant's counsel. It further contends that *S. v. Lance,* 166 N. C., 411, was an entirely different case from this one. There the issue was whether there was a rape or an assault. The State further cites the following cases as illustrative of this distinction: *S. v. Jones,* 98 N. C., 651; *S. v. Foster,* 130 N. C., 666; *S. v. Dixon,* 131 N. C., 808; *S. v. Merrick,* 171 N. C., 788, and the cases there cited. But we are unable to agree with this contention of the State, or to decide according to it; but our opinion is, and we so hold, that the substance at least of the prayer should have been given to the jury, and in failing to do so the court committed an error.

The instruction requested by the prisoner should have been given, at least substantially, and even if not given, or if it had not been asked for, the judge, of his own motion, should have submitted to the jury proper instructions as to the correction of a lesser offense than that charged in the bill of indictment, and his failure to do so even without an appropriate prayer by the prisoner was error. The statute (C. S., secs. 4639 and 4640) provides:

"4639. On the trial of any person for rape, or any felony whatsoever, when the crime charged includes an assault against the person, it is lawful for the jury to acquit of the felony and to find a verdict of guilty of assault against the person indicted, if the evidence warrants such finding; and when such verdict is found the court shall have power to imprison the person so found guilty of an assault for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character.

"4640. Upon the trial of any indictment the prisoner may be convicted of the crime charged therein or of a less degree of the same crime, or of an attempt to commit the crime so charged, or of an attempt to commit a less degree of the same crime."

It is familiar learning that in the criminal law, as in many other respects, the greater includes the lesser, so that where one offense is alleged in the indictment, and the jury acquits as to that one, it may convict of the lesser offense when the charge is inclusive of both offenses. This doctrine was illustrated in *S. v. Fritz*, 133 N. C., 725, and the law was there clearly stated by the present *Chief Justice*, where the defendants were indicted, the one for sending and the other for accepting a challenge to fight a duel, Fritz being alone on trial. The *Chief Justice* said: "An affray consists of mutual assaults, of which one person, as in this case, may be convicted where the other may be acquitted or not put on trial. *S. v. Brown*, 82 N. C., 585. Dueling is simply an aggravated form of affray (4 Bl. Com., 145), and under such indictment the parties may be convicted of a mutual fighting by consent without a deadly weapon. . . . The charge of the greater offense warrants a conviction of a lesser one embraced in it, just as on an indictment for murder there can be a conviction of murder in the second degree or manslaughter, a principle which ch. 68, Laws 1885, extends to authorize a conviction of assault, if the evidence warrants it, though the prisoner is acquitted of the felony, upon an indictment, for any felony which includes an assault as an ingredient."

And so the same Judge said in *S. v. Hunt*, 128 N. C., at p. 586: "Under an indictment for murder, the defendant may be convicted either of murder in the first degree, murder in the second degree, or manslaughter, and even of assault with a deadly weapon, or simple assault 'if the evidence shall warrant such finding' when he is not acquitted entirely. Laws 1885, ch. 68. It is as if all these counts were separately set out in the bill (for it includes all of them), *S. v. Gilchrist*, 113 N. C., 673; and the solicitor can *nol pros* any count, and a *nol pros* in such case is in effect a verdict of acquittal as to that. *S. v. Taylor*, 84 N. C., 773; *S. v. Sorrell*, 98 N. C., 738."

And so it was held in *S. v. Nash,* 109 N. C., 824: "Where there was a serious conflict between the testimony of the prosecutrix and that of the defendant, it was erroneous to restrict the jury to either the theory of the State or to that of the defendant, as they may predicate their finding upon an hypothesis not consistent with either theory." *S. v. Johnson,* 94 N. C., 863; *S. v. Smith,* 157 N. C., 578.

It is said, though, that the jury convicted the prisoner of the capital felony, and this excludes the idea that he was guilty of any lesser offense. This is not a correct proposition, but a clear *non sequitur,* for it does not follow that the jury would not have found the prisoner guilty of one of the lesser crimes included in the larger felony, if they had been properly instructed as to these crimes, of which there was evidence. The presumption, if there is any, is rather the other way. Anyhow, the prisoner was entitled to have all the material phases of the case submitted to the jury in the charge of the court, and a failure to do so was error, and prejudicial to him, for when the judge attempts to state the law he should state it fully.

It is a well recognized principle that where one is indicted for a crime, and under the same bill he may be convicted of a lesser degree of the same crime, and there is evidence tending to support the milder verdict, the prisoner is entitled to have this view presented to the jury under a correct charge, and an error in this respect is not cured by a verdict convicting the prisoner of a higher offense, for in such case it cannot be determined that the jury would not have convicted of the lesser crime if the view had been correctly presented by the judge, upon evidence. *S. v. White,* 138 N. C., 715; *S. v. Foster,* 130 N. C., 666-673; *S. v. Jones,* 79 N. C., 630. In the present case defendant, as stated, is indicted for the crime of rape. Under such an indictment, and by express provision of our statute law, a verdict of assault with a deadly weapon, or even of simple assault, could be rendered if there is evidence to support such a finding. There was testimony of the prosecution from which a verdict for an assault with a deadly weapon could well have been rendered, and evidence on the part of the prisoner tending to show he was guilty, if at all, of only a simple assault. Not only was the law on such an issue not correctly presented in the charge, but his Honor, in effect, told the jury that they could not render any such verdict, and virtually directed them not to consider the evidence offered by prisoner at all, but to find him guilty of rape, or not guilty. It is no answer to this position that the jury were allowed to convict of the capital felony, and that the defendant could have had the benefit of every position open to him on the evidence considered under the charge. There was evidence, as stated, on the part of the defendant tending to show only an act of adultery by consent—an ordinary type of it unless aggravated, in morals at least, by its fre-

quent repetition or the excessive indulgence of their lustful passions. It was all the defense the prisoner attempted. Under our statute and the principles established by our decisions for the ascertainment of the truth in these cases, the prisoner was entitled to have the testimony considered according to its usual and natural significance. In *Jones' case, supra*, the Court held: "Where, upon a trial for homicide, the only evidence relied upon by the State to connect the prisoner with the offense is his own confessions, and those confessions tend to disclose a case of mutual combat upon sudden provocation between the prisoner and the deceased, it was held to be error to exclude that view of the case from the jury, however much it may conflict with opposite theories arising from other portions of the evidence." Applying the principle, we are of the opinion that this conviction has not been had in accordance with our laws, and the prisoner is entitled to a new trial.

As has been said at least once before in this Court, there is evidence in the record from other sources tending to corroborate the position insisted on by defendant, but no amount of reiteration *pro* or *con*, however appealing or eloquent, can or should be allowed to justify a plain departure from established legal principles, and especially when a prisoner is on trial for his life. In order that the prisoner, who is being tried on an indictment for the capital felony of rape, may have the benefit of the law to be stated by the judge, as to the inferior crimes, was the very reason why C. S., 4039 and 4040, were enacted, and this law has been plainly disregarded in the charge given in this case. Section 4040 provides generally, and as to all crimes, that on the trial of any indictment, the prisoner may be convicted of the crime charged therein, or of a less degree of same crime, or of an attempt to commit the crime charged, or of an attempt to commit a less degree of the same crime, and doubts having arisen whether, on indictment for rape, a verdict for an ordinary assault could be rendered, the Legislature enacted section 3268 of Revisal, in terms as follows: "On the trial of any person for rape, or any felony whatsoever, when the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found, the court shall have power to imprison the person so found guilty of an assault for any term now allowed by law in cases of conviction when the indictment was originally for the assault of a like character."

Doubts had arisen before 1885 as to whether, on an indictment for rape, a verdict for an ordinary assault could be rendered, and to settle the same the Legislature enacted Laws of 1885, ch. 68; Rev., 3268; C. S., 4639, which section and the one next following, sec. 4040, now

makes the legislative intent unmistakable that when there is evidence of a lesser offense than the capital one, the prisoner is entitled to have the benefit of it, under a proper charge as to its bearing in his favor or upon the case. There was evidence by the woman herself of an assault with a deadly weapon, and also plenary evidence of other crimes less than the capital felony. The woman testified that his first effort was a complete failure to accomplish his purpose; that while he threw her and raised her clothes, he desisted from any further attempt upon her person, saying that he could not use her there, and ordered her to go on in the woods for nearly a mile, when he again threw her down and had sexual intercourse with her two or three times, at some intervals, which he repeated once more in the same manner, while she was marching through the woods with him, and that he threatened her at times with his gun. There was evidence that the prisoner was guilty only of an act of immorality in having carnal connection with the prosecutrix, or that he committed fornication and adultery, and evidence presenting other and varying views of the case, which were not covered by the charge.

It was said in *S. v. Merrick,* 171 N. C., 788, 791, to have been held in numerous cases, and the position is in accord with high authority elsewhere, that where in an indictment for murder the law in this State permitting a verdict for a lesser grade of the crime, if there are facts in evidence tending to reduce the crime to manslaughter, it is the duty of the presiding judge to submit this view of the case to the jury under a correct charge, and his failure to do so will constitute reversible error, though the defendant may have been convicted for the higher offense, citing *S. v. Kennedy,* 169 N. C., 289; *S. v. Kendall,* 143 N. C., 659-664; *S. v. White,* 138 N. C., 704-715; *S. v. Foster,* 130 N. C., 666-673; *S. v. Jones,* 79 N. C., 630; *S. v. Matthews,* 148 Mo., 185; *Baker v. The People,* 40 Mich., 411. It is also said in the *Merrick case, supra:* "In *S. v. Kendall, supra,* it was held 'to be a principle very generally accepted that on a charge of murder, if there is any evidence to be considered by the jury which tends to reduce the crime to manslaughter, the prisoner, by proper motion, is entitled to have this aspect of the case presented under a correct charge, and if the charge given on this question is incorrect, such a mistake will constitute reversible error, even though the prisoner should be convicted of the graver crime, for it cannot be known whether, if the case had been presented to the jury under a correct charge, they might not have rendered the verdict for the higher offense,' " and further, it was said in *Merrick's case, supra:* "In *Foster's case, supra,* the present *Chief Justice,* delivering the opinion, said: 'If it had been clearly explained to the jury what constituted murder in the second degree, of which, through his counsel, he had admitted himself to be guilty, it may be that the jury would have

coincided with that view; but, in the absence of instruction on that offense, with only the issue of murder in the first degree placed before them with instructions only as to that offense, with evidence of the homicide, it may well be that the jury held against the prisoner, that he was guilty, simply because they were not informed as to the constituent elements of the lesser offense'; and for this omission a new trial was allowed, the prisoner having been convicted of murder in the first degree." In *S. v. Jones, supra*, a conviction for the capital crime of murder, it was held error to exclude from the jury the view of manslaughter, there being evidence tending to establish such crime.

We cannot agree that *S. v. Lance*, 166 N. C., 411, has been sufficiently distinguished by the Attorney-General from this case. It is true that in the *Lance case, supra*, there may have been a question as to whether it was rape or merely an assault, but that identical question is also in this case, and his reference to that question, as being the only one involved in the *Lance case, supra*, does not differentiate it from this one. It is said in the *Lance case, supra*, that there are any one of five verdicts which can be returned by the jury where there is the proper evidence to support the finding: rape, assault with intent to commit rape, assault with a deadly weapon, simple assault, and not guilty. In that case there may not have been sufficient evidence to support a verdict as to any one of them less than the capital felony, though even this was held by a much divided Court, *Justice Hoke* and the writer dissenting upon the ground that the court should have given an instruction as to the crimes of inferior grades embraced in the capital charge, as there was ample evidence to sustain a verdict for the lesser crime. But the case is strong, if not direct, authority for the position that, in this case, where there is evidence of the lesser crimes, the proper charge should have been given as to the inferior offenses included in the higher felony of rape, and this should have been done, whether there was or was not a special request for it. But really no authority is needed for so plain a proposition, as it is self-evident.

The evidence against the prisoner is of a very doubtful or questionable character, even the testimony of the prosecutrix herself. While the State insisted that she had testified that, in all the alleged attacks upon her in violation of her person, she had been forced against her will to submit to his embraces, and that she did not do so voluntarily, there is strong evidence that she did, and that sexual intercourse with the prisoner was not at all disagreeable, distasteful, or offensive to her. According to her own statement of the transaction, he threw her down when they were only about fifty yards from the edge of the woods, but did not then have his way with her, and then she went on with him further in the woods, about a mile, when he made his second attack successfully,

and, again farther on, he made a third attack and accomplished his purpose, and perhaps did the same thing still another time, they being in the woods altogether for several hours. In all this time she made no outcry, as far as appears, and, according to his testimony, did not attempt to resist any of the alleged assaults upon her. Her conduct, even according to her own version of it, tends to corroborate the prisoner's evidence that she had frequently expressed her willingness to meet the prisoner and favor his solicitations. They met casually on the morning of the alleged assault upon her, when he accosted her, reminded her of their previous agreement, and told her that the opportunity for its fulfillment had arrived, to which she made no denial or protest, but after walking away in the direction of Wilmington about fifty yards, she returned and assented to his suggestion, went into the woods with him voluntarily and voluntarily had sexual intercourse with him, at his will and pleasure, several times, remaining with him for a long time, walking about with him, and they did not separate until he had fully gratified his lustful passions and his further desires had subsided. She then went to the city, but told no one of what had happened, although she saw several people on her way back to the city, and did not make any complaint for some time. Her conduct was not, by any means, that of an outraged woman, and certainly not of a chaste or virtuous woman, but she acted in a perfectly natural and normal way of a lewd and lascivious female. It is unfortunately sometimes the way of a maid with a man, and conversely. We recite this much of the testimony to show how carefully judges should charge juries in such cases, so that they may subject the testimony to close examination and scrutiny, as the accusation is one very easy to make and very hard for the man to rebut, or overcome.

If the prisoner be guilty, he has committed one of the worst and most detestable crimes in the catalog, and should be severely punished, but before he is convicted of so grave a crime he should be fully heard, and all of the testimony should be most carefully weighed and considered.

The error in the charge entitles him to another jury, and it will be so certified, to the end that justice may be administered, without denial or delay, and in accordance with the law.

New trial.

STATE v. CHARLIE HUTCHINS AND R. S. RUSS, SURETY.

(Filed 11 April, 1923.)

1. **Criminal Law—Principal and Surety—Appearance Bond—Liability of Surety.**

The liability of a surety on the appearance bond of a defendant bound over to the Superior Court upon order of a municipal court in a criminal action, is a continuing obligation from which neither the principal nor his surety is relieved until the cause is finally disposed of or they are discharged by order of court.

2. **Same—Defendant's Duty to Docket Appeal—Court's Jurisdiction.**

Where the defendant in a criminal action has been bound over to the Superior Court for trial, to which he has appealed, it is his duty to have his case docketed at the next criminal term of the Superior Court, at which it is due, and where he has failed to do so, and the case, subsequently docketed, comes up at a subsequent term for trial, the matter not being jurisdictional, the surety on the appearance bond remains bound thereon until he is released by final judgment or discharged by order of the court.

SCI. FA. to enforce forfeited recognizance, heard on notice issued and served on the surety before *Shaw, J.*, at January Term, 1923, of FORSYTH.

From a perusal of the record and case on appeal, it appears that on 21 August, 1921, defendant Charlie Hutchins was convicted in municipal court of said county of the criminal offense of operating an automobile while intoxicated, and adjudged to pay a fine of $50. That he appealed to Superior Court, and entered into a bond in the sum of $100 for his appearance at the next criminal term of the Superior Court of said county. That said cause against defendant Charlie Hutchins was docketed at December criminal term of Superior Court of Forsyth County, and continued from term to term till July term of said criminal court, when said defendant was duly called, and failing to answer, judgment *nisi* was entered, and on notice duly issued, served on the surety, principal defendant not found. There was judgment absolute against the surety for the penalty of the bond.

In answer to the *sci. fa.*, it was shown that the clerk of the municipal court failed to send up the case against Charlie Hutchins to the next criminal term of the Superior Court after judgment entered against him, to wit, the October Term, 1921, and that the principal defendant had attended at said next criminal term, until adjournment of same, and no case was called against him at that term.

There was judgment against the surety for the penalty of the bond, and he appealed to this Court, assigning for error:

1. That the court at January Term, 1923, was without jurisdiction to enter the judgment on the bond.

2. That on the facts presented, the court should have ruled that the principal defendant had in all things complied with the obligation of the bond.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Charles W. Stevens for defendant R. S. Russ.

HOKE, J., after stating the case: The appearance bond on which the judgment has been entered is in terms as follows:

We, Charlie Hutchins and R. S. Russ, of said county, acknowledge ourselves to be severally indebted to the State of North Carolina in the sum of $100 to be well and truly paid if default shall be made in the following condition:

The condition of this recognizance is such that if the said Charlie Hutchins shall personally appear at the next criminal term of the Superior Court of Forsyth County, to be held at the courthouse in Winston-Salem on 3 October, 1921, then and there to answer the charge preferred against him for operating auto intoxicated, and to do and receive what shall by the court be then and there enjoined upon him, and shall appear and attend at such time or times thereafter as the court may appoint upon any and all adjournments and continuances of said cause until the final disposition thereof, and shall not depart the court without leave, then this recognizance to be void, otherwise of force and effect.

C. S. HUTCHINS. [SEAL.]
R. S. RUSS. [SEAL.]

In reference to bonds of this purpose and tenor, it has been uniformly held in this jurisdiction that they constitute a continuing obligation, and that neither principal nor surety is relieved until the cause is finally disposed of, or they are discharged by order of the court. *S. v. Eure,* 172 N. C., 875, and authorities cited. *S. v. White,* 164 N. C., 410; *S. v. Schenck,* 138 N. C., 560; *S. v. Morgan,* 136 N. C., 602; *S. v. Jenkins,* 121 N. C., 637; *S. v. Smith,* 66 N. C., 620; 5 Cyc., 123; 3 A. & E. (2 ed.), p. 714. In this last citation the principle as it prevails with us is stated as follows: "Neither does the obligation end with the term at which the principal is recognized to appear, but if the cause against him be continued, the bail are bound to have him in court at each succeeding term thereafter, until he is convicted or acquitted, or they are otherwise legally discharged."

And *S. v. Schenck, supra,* is quoted with approval as holding that the bond binds the sureties for the continued appearance of their principal from day to day until finally discharged by the court, and he must

answer its call at all times and submit to the final judgment. Nor is the position affected because the appeal was not docketed at the ensuing term. That is a duty incumbent on the appellant, and while it has been decided that the docketing at a subsequent term may not be allowed over the protest of the appellee, it is also held that the failure to docket may be waived by the appellee, or the right to dismiss lost by his laches, and the objection, therefore, does not present a jurisdictional question. *Barnes v. Saleeby*, 177 N. C., 256; *Love v. Huffines*, 151 N. C., 378.

On the record we are of opinion that neither position of appellant can be sustained, and the judgment of the Superior Court must be

Affirmed.

STATE v. HARDY SISK AND SANDY SISK.

(Filed 11 April, 1923.)

1. Appeal and Error—Objections and Exceptions—Evidence—Questions and Answers.

Exceptions to the exclusion of questions asked witnesses on a trial will not be considered on appeal when it does not appear what the answers would have been.

2. Evidence — Intoxicating Liquors — Spirituous Liquors — Homicide—Murder.

Upon the trial for murder of an officer while attempting to arrest the defendant for violating the prohibition law, testimony as to what the deceased had said before then about wishing that the defendant would sell his land and move away from the community is irrelevant, and properly excluded by the trial judge.

3. Same—Reputation.

When the defendant is tried for the murder of an officer while arresting him for violating the prohibition law, testimony as to whether the witness had heard of the deceased holding up people and shooting at them for carrying whiskey in their automobiles is properly excluded as incompetent.

4. Homicide — Murder— Coprincipals—Self-defense—Evidence—Instructions—Appeal and Error—Harmless Error.

When a father and his two sons are tried for murder as coprincipals, and the evidence tends to show that the sons had commenced the firing upon the deceased, an officer with warrants for their arrest, resulting in his being killed by the father in self-defense, the defense of the father is not available to the sons who had willfully commenced the firing resulting in the death; and an error in an instruction in favor of the sons upon this principle cannot be complained of by them. *S. v. Whitson*, 111 N. C., 695, cited and distinguished.

APPEAL by defendants from *Shaw, J.*, at January Term, 1923, of ROCKINGHAM.

The defendants and their father, Ed. Sisk, were tried upon an indictment for murder in the first degree. The father, Ed. Sisk, was found not guilty, but the two sons, Hardy and Sandy Sisk, were convicted of murder in the second degree.

On 14 April, 1922, the deceased, E. C. Zeigler, a deputy sheriff of Rockingham County and policeman at Madison, and W. T. Steele, who was a policeman from Mayodan, went out to the house of Ed. Sisk on a search for illicit whiskey, and policeman Steele had at the time two warrants for the arrest of Sandy Sisk. In the neighborhood of the Sisk house the officers, in their search for whiskey, separated. Steele testified that shortly after the separation he heard some one cursing, and Zeigler called, "Steele, come here"; the cursing was being done mostly by the defendant, Sandy Sisk; when he got up there Sandy was cursing and swearing that he would not be arrested; Sandy had a pistol in his right hand; his brother Hardy came around the house with a shotgun in one hand and a pistol in the other and told Steele not to come up there; Steele said that he said to them, "You boys had better put those guns down; you are not going to hurt anybody"; and when he went on three or four steps further the father, Ed. Sisk, walked up. He reached over and got the shotgun from Hardy and asked what the trouble was. The witness replied that he had a warrant for Sandy's arrest. Ed. Sisk asked him what it was for, and he read the warrants, and Sisk said, "Let him alone; he will come down some time and see about it." Steele replied that he must have Sandy or a bond for him, to which the father replied, "All right, I will sign the bond." But Hardy and Sandy both spoke up and said with an oath that they would not sign anything, and then the father said he would not sign. They kept on cursing and swearing that they would not be arrested, and were backing off from him and Zeigler, who had come up. Finally Steele said to the old man, "You will sign this bond," and squatted down on his knee to write it out. As he did so, he said he heard Zeigler say, "Hold up," or "Hands up," and the firing started right off. He saw Sandy shoot at Zeigler. The witness then grabbed his pistol and as he threw it up Ed. Sisk threw his shotgun up and Zeigler fell. Hardy was also shooting. Ed. Sisk, the old man, was 6 to 7 steps from Zeigler at the time the witness saw him fire his gun. The witness then commenced firing, and there was a good deal of it done, although he did not see Zeigler shoot any, nor have any pistol, that day. When the gun fired, Zeigler fell.

It was in evidence that previous to this occurrence both Hardy and Sandy Sisk had declared that they would not be arrested, but would fill any officer who came out there with a warrant for them with lead. The gun-shot wound by the father, Ed. Sisk, caused the death of Zeigler. The coroner also found in the groin of the deceased, Zeigler, a wound

caused by a pistol bullet, which probably punctured a blood vessel. It is also in evidence that pistol bullets had passed through the clothes of the deceased without making any fatal wound.

Upon the evidence, the State insists that the two Sisk boys commenced the firing upon Zeigler. When Ed. Sisk, the father, came up Sandy had in his hands not only the pistol, but a loaded shotgun. The father took the shotgun out of Hardy's hands. When Steele suggested to Ed. Sisk that he sign the bond for Sandy's appearance at court, Ed. Sisk consented, and Steele was kneeling down filling out the bond when the shooting commenced. There seems no doubt from the evidence that the wound in the head of the deceased from the shotgun in the hands of Ed. Sisk was the fatal shot. Ed. Sisk claimed that Zeigler had shot off the end of his nose before he used the shotgun, and was still firing at him, and he shot to protect his life. The jury seems to have taken that view of the evidence, for they acquitted Ed. Sisk upon the ground of self-defense, but convicted the two boys of murder in the second degree. From the judgment they appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

A. L. Brooks and Glidewell & Maybrick for defendants.

CLARK, C. J. Upon the evidence of the State, the two Sisk boys were offering armed resistance to the arrest of Sandy Sisk upon a valid and legal warrant, and began shooting. In the promiscuous firing that ensued, Zeigler apparently was killed by the father, but the two boys were engaged in firing at the time.

The defendants excepted to the exclusion of the following questions: (1) "Did not Zeigler have the general reputation of being a violent man and shooting when he was off on a raid?" It does not appear what the answer would have been. (2) The defendants also excepted to the exclusion of the testimony of the witness Gunter, who said in reply to a question: "Mr. Sisk had a lot surveyed off the mill, and my understanding was he was going to sell it and Mr. Zeigler said he wished the damned rascal would sell it or die and leave." The court properly struck out this evidence as irrelevant. (3) The court refused to allow the witness Money to answer the following question: "You have heard of Zeigler holding up people and shooting at them for carrying whiskey in their automobiles." This was properly excluded as incompetent, and, besides, it does not appear what the answer would have been; and further, the witness was permitted to state that Zeigler did not have a general reputation to that effect. The motion in arrest of judgment was properly refused.

The court charged the jury: "In this case the State asks you to return a verdict of murder in the first degree, but I will instruct you that your verdict may be guilty of murder in the first degree; guilty of murder in the second degree; guilty of manslaughter, or guilty of excusable or justifiable homicide, as you may find the facts to be from the testimony of the witnesses."

The defendants excepted to the following charge: "If you find that the defendant, Ed. Sisk, was not at fault himself, that he did not fight willingly, but reasonably apprehending it necessary to shoot and kill Zeigler in order to save his own life, or himself from some great bodily harm, he shot, he would not be guilty, and neither would the boys be guilty, although they may have been there aiding and abetting, or they may have been shooting at the time, they would not be guilty of manslaughter, although they may have been engaged in the shooting." If there was any error in this charge it was in favor of the defendants, and they cannot complain of it.

Finally the defendants excepted, because the court did not charge the jury that "If the jury should find that the defendant Ed. Sisk did the killing, as contended for by the State, and admitted by him, and that such killing was justifiable, and they should find him not guilty, that the other two defendants, Hardy and Sandy Sisk, would not be guilty of murder in the second degree, even though they may have aided and abetted their father in the killing." There was no prayer to this effect.

The indictment was not against Ed. Sisk for murder and against the sons for aiding and abetting, but the indictment was against all three for murder in the first degree. The killing of Zeigler occurred during the armed resistance of the two Sisk boys to the arrest of Sandy Sisk under a valid and legal warrant. The evidence for the State is that they opened fire on the officers, and in the promiscuous shooting that followed Zeigler was killed, apparently by Ed. Sisk. It is not a case of homicide by Sisk, the boys aiding and abetting him, as in *S. v. Whitson,* 111 N. C., 695, but they were all engaged, upon the evidence, in the shooting, and if there was error in the charge of the judge in favor of Ed. Sisk, or of the jury in finding him not guilty upon the idea that so far as he was concerned he was acting in self-defense, or in defense of his boys, this cannot inure to the benefit of the defendants, who were principals in the affair if they were resisting with weapons the service of the warrant, and began the shooting.

The idea of the jury evidently was that the father had entered the fight in protection of himself only after he had been shot in the nose, and was not guilty. This was no defense to the two defendants if they started the difficulty, and began the firing upon the officers, which resulted in the killing of Zeigler. If it is true that the father fired the

shot which killed the deceased, but the other defendants began the firing and were engaged in carrying it on, they were not aiders and abetters, but were principals in the unlawful shooting in which the officer was killed, and the father doubtless was found not guilty because the jury found that he acted in self-defense.

The indictment was against the father and the two boys as coprincipals. If the defendants originated the firing in which Zeigler was killed, and the boys were in armed resistance to the service of legal process, they were responsible for the homicide of the officer. So far as they are concerned, it is no defense that the officer was killed by their father whom the jury, whether rightly or wrongly, acquitted of any responsibility, presumably upon the ground that the old man's part in the fight was taken in self-defense. The verdict as to him cannot be considered by us, and it "cannot be imputed to the defendants for righteousness." If Zeigler was killed by a shot fired in armed resistance to the officers of the law, begun and carried on by these defendants, they certainly were not acting in self-defense.

The court in its charge recapitulated very fully and carefully the evidence and contentions of both sides, and charged the law applicable. He called attention to the evidence and the contention of the defendants that Zeigler was a man of dangerous and violent disposition; that he had made threats against the defendants, and that he began the shooting on this occasion. He also recited the evidence and the contentions of the State that Zeigler was not a man of dangerous and violent character, and that he was unarmed on this occasion, and that the shooting began upon the part of the defendants. Ed. Sisk went upon the stand on his own behalf, but the judge charged the jury that they could not consider the fact that Hardy and Sandy Sisk did not go upon the stand to their prejudice; that they had a right not to do so. The charge was very full and complete, and seems to have presented the case to the jury in every aspect of the evidence and all the contentions of the respective sides. The sole exceptions are those above stated.

No error.

STATE v. MED. JOURNEGAN.

(Filed 11 April, 1923.)

1. Evidence—Corroboration—Statements Made by Witness to Others—Criminal Law.

A witness may corroborate his testimony by testifying that he had made the same statement to other parties, and a defendant in this action for illicit manufacturing of liquor was properly permitted to testify as to the identity of two others who were with him engaged therein, but escaped

the officers making the arrest, and then to state that he had told the officers making the arrest that they were present and engaged in the unlawful act.

2. Intoxicating Liquors—Spirituous Liquors—Criminal Law—Evidence—Mental Incapacity—Criminal Intent.

When the defendant is being tried for illicit distilling of whiskey, it may be shown in defense that he was mentally incapacitated from distinguishing between good and evil and could not appreciate the illegal consequences of his act because of mental incapacity; but testimony by a nonexpert, and from his personal observation, to the effect that the defendant did not have mental capacity to operate a still is incompetent and properly excluded. The charge in this case is approved.

WALKER, J., concurring.

APPEAL by defendant from *Cranmer, J.,* at January Term, 1923, of FRANKLIN.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

William H. & Thomas W. Ruffin and W. M. Person for defendant.

CLARK, C. J. The defendant, a white man, and two negroes were found by the officers at a copper still actively engaged in the manufacture of whiskey. They had two barrels of beer, some jugs, a bushel of meal in a bag, and two empty barrels. One of the negroes, Percy Mitchell, on being examined for the State, testified that he, Harry Alston, and the defendant Journegan were at the still at the time the officers came up. They ran before the officers reached them, but Percy Mitchell was caught while running off by Mr. Fuller, one of the officers, and he was permitted to testify that he told Fuller who were present at the still, and to state that the defendant Journegan and Harry Alston were the men. The defendant excepted, but it is settled by this Court that a witness can corroborate himself by testifying that he had made the same statement to other parties. *S. v. Maultsby,* 130 N. C., 664.

The defendant relies, however, upon exceptions to the refusal of the court to permit answer to the following questions by one Thompson, witness for the defendant: "In your opinion, do you think that he (Journegan) has sense enough to operate a blockade still?" and, also, "Do you think, on 12 December, 1922, Journegan had sufficient mental capacity to operate a still, and to know it was wrong to run it?" The answers to these questions were excluded, and it does not appear what they would have been. The real inquiry is not his capacity to run a blockade still, but did he aid in doing so, and did he know it was wrong.

While an ordinary witness, who has peculiar opportunities to observe, may express an opinion upon the sanity or insanity of a person charged with a crime, or in other cases where such sanity or insanity is an issue,

yet this expression of opinion goes only so far as to permit the witness to testify that in his opinion the defendant was insane or sane, but not whether he was guilty of this particular offense because of lack of mental capacity.

Whether or not Journegan had sense enough to operate a blockade still was not for the witness to determine. The evidence is that Journegan, a white man, was in fact operating the still and supervising two negroes who were aiding him.

In *S. v. Haywood*, 61 N. C., 376, *Pearson, C. J.*, approved the following introduction by the judge as to the test of insanity in criminal cases: "If the prisoner at the time he committed the homicide was in a state to comprehend his relations to other persons, the nature of the act in its criminal character; or, in other words, if he was conscious of doing wrong at the time he committed the homicide, he is responsible. But if, on the contrary, the prisoner was under the visitation of God and could not distinguish between good and evil, and did not know what he did, he is not guilty of any offense against the law; for guilt arises from the mind and wicked will." This definition has always been sustained and followed in this State. In that case, *Chief Justice Pearson* said: "We fully approve of the charge of his Honor upon the subject of insanity. It is clear, concise, and accurate; and as it is difficult to convey to the minds of juries an exact legal idea of the subject, we feel at liberty to call the attention of the other judges to this charge." This case has been repeatedly cited with approval since.

The judge charged the jury: "Now as to the plea of insanity. I have instructed you, and repeat my instruction, that there is no burden upon the State. It is presumed that all persons are sane, and he who pleads insanity must prove it to the satisfaction of the jury. You will remember the evidence of the defendant, the burden being upon him, and give it such weight as you may find it is entitled to, and the other witnesses such credibility as you may find them entitled to receive."

The judge further charged the jury: "The first thing to which you will address yourself will be the question of the sanity of the defendant at bar, and you will remember the law which I have given you, and if you find at the time that the alleged act was committed, if you find beyond a reasonable doubt that he committed either of the acts charged in the bill, he was conscious of doing a wrong, then he would be guilty, but if he was under a visitation of God, and could not distinguish between good and evil, and did not know what he did, he would not be guilty." To this charge there was no exception.

It would lead to strange results if the precedent were set in this case that a witness could testify whether in his opinion a man who committed forgery had "sufficient mental capacity to do this and understand

that it was wrong"; or whether a man guilty of homicide by the use of a deadly weapon had "mental capacity to use a deadly weapon, and to know it was wrong to kill." Larceny is defined to be the felonious taking and carrying away of the goods of another with the intent to appropriate them to one's own use. On this charge it would be competent to prove these facts, and in defense the defendant could show that he did not know right from wrong, and therefore could not have the intent. But it would be without precedent to ask if a defendant had mental capacity to commit larceny.

Such a course of examination is without precedent, and if competent in this case where the man was found in actual perpetration of the crime and supervising the work, such inquiries would be without restriction and instances may be readily imagined which would lead to very curious results.

The defendant himself was put upon the stand and his examination shows no lack of mental capacity. He testified that he only dropped in accidentally and had nothing to do with operating the still. The testimony of his two associates, the colored men, being to the contrary, the jury did not believe him. There was ample testimony upon the question as to his mental capacity. The testimony was that he was 43 years of age, owned a large house and a farm of 34 acres, and rented out his lands. He had no guardian and collected his own rents. There was direct evidence from numerous witnesses that his mental condition was fairly good, and that in the opinion of witnesses he knew right from wrong. W. W. Green, one of the witnesses for the defendant, testified: "I consider him far removed from an imbecile. I believe if any one told him he would be punished for doing a thing he would know that, but I do not think he has any conscientious scruples, only from being caught." This description would probably apply to many men guilty of crime.

E. M. Newman testified that he "had been living within a half mile of the defendant for 22 years. His mental condition was fairly good. In my judgment he has mental capacity to know right from wrong. As to his general character and reputation, he is just an ordinary character, nothing so extra bad and nothing so good. Some good and some bad." There were several other witnesses for the State who testified to the same purport.

Both the negroes testified that the defendant was there when they were caught, and had lighted the fire under the copper still and pushed the fire up when the still was boiling, and he knew enough about right and wrong to run when the officers came. Whether these facts made him guilty was a matter for the jury, and did not rest in the suppressed opinion of the witness whatever it might have been, whether he "had sense enough to run a blockade still."

What is the art and mystery of "running a blockade still," and what is the standard of efficiency which is necessary to make the operator liable? There is no institution, so far as we know, that issues a certificate that the holder is "capable of running a blockade still." Does it mean that the defendant must have capacity to run a blockade still successfully and profitably, and without being caught—and that if he fails in the latter respect he is not guilty? "If so, *leg*-ality is an essential element of such capacity." The defendant did his best. He outran the officers.

The question was properly ruled out, for it was not necessary to show that the defendant had "capacity to run a still," but did he aid in doing this illegal act.

For ages the test has been in trials for all crimes. Did the defendant do, or take part in doing, the illegal act and have the mental capacity to know he was doing wrong? Both these questions were fully and correctly presented in this case both on the evidence and in the charge, and the jury found against the defendant.

Before a witness can testify as to general character or the mental capacity of another, he must qualify himself as to his means of observation. Even then he can testify only as to general character or mental capacity.

There is no precedent in the books to ask as to the mental capacity to commit any particular crime. Why should it be created as to "illicit distilling of spirituous liquor," especially when the witness does not testify of his own knowledge of the subject, or his observation of the defendant in exercising that particular art or committing that particular crime?

No appeal presents the question of the liability of the two negroes, but the defendant, a white man, a landowner, renting out land and collecting his rents, without a guardian, seeks to evade liability for taking part in the event by asking witnesses whether the defendant had "mental capacity to run a blockade still" —which might exculpate most, if not all, men who are caught at it.

Whether the defendant committed the act charged, and whether he knew right from wrong as defined by the court, was duly submitted on the evidence and in the charge, and found by the jury adversely to the defendant; but there is no precedent as to what is necessary to constitute "mental capacity to run a still." Does it include knowledge of the method needed to elude the officers, to make a good article, to be wary in selling it, fleetness in getting away when the officers pounce upon him, and possibly other qualifications? There being no precedents as to this, it ought not to be charged as error to the judge that he excluded such

question and submitted only inquiry according to the settled form as to the acts constituting the crime and sufficiency of knowledge in the defendant to know that he was doing wrong.

No error.

WALKER, J., concurring: I agree with the opinion and conclusion of the Court in this case, for the same reason and partly upon the same ground that I refused my assent to the opinion in the case of *In re Peterson,* 136 N. C., 13, at page 28, though for reasons there stated I concurred in the result, a new trial having been awarded.

It is not competent for a witness, especially a nonexpert, to give his opinion, for instance, as to whether a testator or a grantor in a deed had or had not sufficient mental capacity to execute the particular instrument in question, and much less is it competent for him to state whether a defendant had sufficient mental capacity to run, or operate, a whiskey or brandy still. I stated fully the reason for the opinion I then held, when the Peterson case was decided (1904), and have entertained ever since (being more convinced, after greater consideration of it since that time, that it is clearly right). I appeal to the highest authority, one of the greatest, if not the greatest, judge who ever sat upon this bench, and I disparage none in so saying. The very question was raised in *Crowell v. Kirk,* 14 N. C., 356. At that time this bench was composed of Leonard Henderson, Thomas Ruffin, and Joseph J. Daniel. *Judge Ruffin,* in his opinion, said: "As far as we perceive any meaning, we suppose the attempt was to get the opinion of the witness, whether the supposed testator had capacity *to make a will.* It could not be, whether he thought him in possession of ordinary faculties, when he executed the instrument; because the witness did not profess to have been present; and because he had just said that when sober he had his proper mind and senses. If this was the purpose of the inquiry, it was properly refused; for the witness is not to decide what constitutes mental capacity, or a disposing mind and memory; that being a matter of legal definition. He might state the degree of intelligence or imbecility in the best way he could, so as to impart to the court and jury the knowledge of his meaning, that they might ascertain what was the state of the testator's mind and memory; but whether that was adequate to the disposition of his property by will did not rest in the opinion of the witness." That is the question we have here, although the latter is far less competent than was the question in the *Crowell case, supra.* In Lawson on Expert and Op. Evidence (2 ed.), 155, it is said: "Capacity to make a will is not a simple question of fact. It is a conclusion which the law draws from certain facts as premises. Hence, it is improper to ask and obtain the opinion of even a physician as to the capacity of any one to make a

will. Under our system that question was addressed to the jury. All evidence which tended to shed light on his mental status, the clearness and soundness of his intellectual powers, should have gone before them. This being done, however, the witness should not have been made to invade the province of the jury." And the same was also stated in the following authorities: *Walker v. Walker*, 34 Ala., 470; *In re Arnold*, 14 Hun., 525; *Reg. v. Richards*, Fos. & Fin., 87, and *Fairchild v. Bascom*, 35 Vt., 416, citing *Crowell v. Kirk*, 14 N. C., 356. But the opinion of the Court, as delivered by *Judge Daniel*, in *Crowell v. Kirk*, *supra*, is conclusive upon the incompetency of such a question. He said: "The defendant's counsel asked his own witness, Harris, if in his opinion the testator was capable of making a will; an objection being made, the witness was not permitted to answer the question. I do not think that the judge erred in this. The opinions of witnesses in England are confined to persons of science, art, or skill in some particular branch of business, and they have to give the reasons upon which their opinions are founded. All other witnesses are to state the facts, and the jury make up their opinions on the facts thus deposed to. In this country the courts have said that the law placed the subscribing witness about the testator to ascertain and judge of his capacity. But no case has gone the length of permitting the evidence of opinion offered in this case to go to the jury." The case last cited, it seems, is directly in point and explains what is said in *Clary v. Clary*, 24 N. C., 78, so as to reconcile that case with the authorities. What was stated by *Judge Gaston* in *Clary v. Clary*, *supra*, is fully explained by *Judge Daniel* (for the entire Court) in the *Crowell case*, *supra*, where it is said, at least substantially, that *Judge Gaston's* language must be considered in relation to the particular question asked the witness in that case, and had reference to mental condition or soundness, and not to mental capacity, which is quite a different thing.

The error in *Whitaker v. Hamilton*, 126 N. C., 465, and which has crept into some other expressions in our decisions, rests entirely upon what was supposed to have been said in *Clary v. Clary*, *supra*, and one or two cases in which the Court seems to have clearly misunderstood the scope of that decision, as fixed by *Judge Ruffin*, the elder, *Judge Daniel*, and *Judge Gaston*, and by other judges who have followed them. *Smith v. Smith*, 117 N. C., 326; *McDougald v. McLean*, 60 N. C., 120. And in Rogers on Expert Testimony (2 ed.), p. 164, sec. 69, it is said that the "weight of authority is opposed to allowing the witness to express an opinion as to whether an individual had the mental capacity to dispose of his property by will or deed."

There is a wide difference between mental condition or soundness and mental capacity, and if this difference is carefully regarded, most of the

cases in our Reports can easily be harmonized. *Crowell v. Kirk,* 14 N. C., 356; *Clary v. Clary, supra; Smith v. Smith,* 117 N. C., 326; Lawson on Exp. and Op. Ev. (2 ed.), p. 155; *Fairchild v. Bascom,* 35 Vt., 416; Reg. Richards, Fos. and Fin., 87; *Walker v. Walker,* 34 Ala., 470; *In re Arnold,* 14 Hun., 525. The case of *Whitaker v. Hamilton,* 126 N. C., 465, was, in my opinion, erroneously decided, and should be overruled. A witness is no more competent to express an opinion as to the mental capacity of a testator to make his will than he would be to state that an act was negligently done, both involving questions of law. The latter kind of testimony this Court has steadily and consistently held to be incompetent. *Tillett v. R. R.,* 118 N. C., 1031. Nor can he state that another has acted bona fide, or without fraud. *Wolf v. Arthur,* 112 N. C., 691. In *Tillett v. R. R., supra,* at p. 1042, *Justice Avery* said: "When, therefore, the witness was asked to state whether a car was coupled in a negligent manner, the question was calculated to elicit an opinion upon one of the questions which the jury were impaneled to decide, and the objection to its competency, being made in apt time, was properly sustained." *Smith v. Smith, supra.* Mental state may be proved by a witness's opinion, as in *McRae v. Malloy,* 93 N. C., 154, cited in the opinion of the Court. See, also, *Sherrill v. Tel. Co.,* 117 N. C., 353. It is also competent for a witness to give his opinion as to whether a person is a negro or not (*Hopkins v. Bowers,* 111 N. C., 175), or that his appearance indicates the presence of negro blood in his veins, as in *Gilliland v. Board of Education,* 141 N. C., 482. But in all the cases just noted, and in those cited in the opinion of the Court, as well as in the principal case, the inquiry referred to a state or condition not complicated with a question of law. A witness cannot give his opinion as to what the law is, either directly or indirectly, unless that is the very issue involved or the subject of inquiry, as when it relates to the law of some other jurisdiction, and he is called as a professional expert to prove it. That a nonexpert should not be asked a question requiring him to express his opinion upon a question of law would seem to be a proposition so plain as not to require any argument to demonstrate its correctness. He could just as well be asked if a will or deed had been properly executed. It is not the nature of the particular question of law involved, but the fact that it involves a question of law, which renders the witness incompetent to answer such a question.

This question is considered by me as very important to mark and preserve the true and proper distinction which separates competent from incompetent evidence; otherwise great injustice may be done in the trial of causes.

It would seem that the question asked in this case, as to the sufficiency of defendant's mental capacity to run a still, is so wide of the mark

when brought to the test of well settled rules of evidence as to be plainly incompetent. As a general rule, questions relating to character or to mental characteristics should be more general in form. If it was intended to show that defendant was weak-minded with a view of arguing upon that and other evidence or circumstances that he was an imbecile, or not endowed with sufficient sense or perception to distinguish between right and wrong, and therefore that he was incapable of committing a crime, the evidence would, perhaps, have been competent and admissible, but to ask a witness if the defendant had mental capacity sufficient to run or operate a whiskey still would depend more upon his actual knowledge of such matters, acquired by his experience, than upon his mental ability or his natural skill. It does not, we imagine, require any high order of intellect, and certainly not of morals, to run or operate so simple a contrivance as a still, as very slight practice and experience would suffice in an ordinary case, as this was. The question was not as to his mental capacity to run a blockade still, but as to his capacity to distinguish between right and wrong, or the *capax doli*. As we say, and as the Assistant Attorney-General substantially puts it in his brief: Whether or not, then, Journegan had sense enough to operate a blockade still was not the question. The fact was, he was operating the still, and with apparent vigor and success, and the inquiry should be confined to the question whether he was criminally liable for his act. If he was too insane to know the quality of his act, that is, to know that it was wrong and forbidden by law (*malum in se or malum prohibitum*), and the witness had had opportunity for observing him sufficiently to enable him to answer the question intelligently, he could give an opinion upon his sanity, or insanity, at the time the crime was alleged to have been committed. *S. v. Ketchey,* 70 N. C., 621; *McLeary v. Norment,* 84 N. C., 235; *Whitaker v. Hamilton,* 126 N. C., 465; *S. v. Terry,* 173 N. C., 761; *S. v. Coley,* 114 N. C., 879. Exceptions 5 and 6 were to the court's overruling objections to the following questions: "Is Journegan sufficiently capable to buy a stilling outfit?" (He had already bought it, and with seeming good judgment, and was actually using it.) "Have you any idea what his income is from his estate?" The answers to these questions, in view of conceded facts, would have been plainly irrelevant as throwing no light upon the issue under investigation. Exception 7. Again, W. W. Green, a witness for the defendant, was testifying when he was asked this question, "Do you think he has sufficient mental capacity to operate an illicit distillery, and to know that it was wrong?" The same observation may be made upon this exception as was made upon exceptions 3 and 4. The opinion the witness was permitted to express was whether or not the defendant was insane, or of unsound mind, at the time. It was a matter for the jury, and not for the witness,

to determine whether or not he had sufficient mental capacity to operate a distillery and to know that it was wrong. The defendant himself, however, went upon the stand and testified in the presence of the jury, and there is not the slightest indication, in his own testimony, of any diseased state of mind which would prevent his knowing the illegal quality of the act he was engaged in; on the contrary, it shows distinctly that he knew that making whiskey was both illegal and morally wrong. There is no attempt in any of the evidence of the defendant to show that he had intervals of insanity and intervals of sanity. On the contrary, that evidence, if true, and taken in any aspect of it, would only show that he was not a man of normal strength of mind on account of his having had a sunstroke about 25 years ago. In any view of the case, it seems that the defendant was properly convicted and properly sentenced.

The fact that Journegan was present when the officers went to the place where the liquor was being manufactured, and the further fact that Journegan was in charge of the still, and was the leader of the "gang," so to speak, directing what was being done illegally at the place, would seem to rebut the idea that he did not know what he was about, or did not fully comprehend that he was committing an unlawful act.

If the evidence were admissible, its exclusion should be assigned to the class of harmless errors, and surely is not such a one as calls for a reversal of the judgment. Nothing of any importance would be accomplished by such a course. If a witness had testified that Journegan did not have sufficient mental capacity to know that what he was doing was illegal, the jury would not have believed him, and should not have done so, for the contrary was so palpably the truth, if we judge the defendant by his own conduct when he was caught at the still—*flagranto delicto.* Besides, his own and real defense was that he did not run the still—not that he did not know how to run it. He knew intuitively that it was wrong to make "blockade liquor," because when the officers appeared he took to his heels. Thus conscience does make cowards of us all, as Hamlet soliloquized, and there is nothing that has been more truthfully said and established in all the centuries. If this man did not know it was wrong to make blockade liquor, or any kind of liquor in these times, if he was so benighted as that, there was nothing to run from. He would have stood his ground in his ignorance and imbecility. He exercised his mental faculties, felt consciously guilty, and fled instinctively before the pursuit of an offending law, represented in the person of its approaching officers.

The case is such a plain one, and defendant's guilt is so conclusively established, that there is, at least, no substantial error, as the basis of a new trial, which is granted only when there is prejudicial and not merely

theoretical error. Verdicts and judgments should not be lightly set aside upon grounds which show that alleged error to be harmless, or where the appellant could have sustained no injury from it. There should be at least something like a practical treatment of the motion to reverse, and it should not be granted except to subserve the real ends of substantial justice. Hilliard on New Trials (2 ed.), secs. 1 to 7. The motion should be meritorious and not frivolous. Graham and Waterman on New Trials, vol. 3, p. 1235. Courts are instituted to enforce right, and restrain and punish wrong. Their time is too valuable for them to interpose their remedial power idly, and to no purpose. They will only interfere, therefore, where there is not only error, but a prospect of ultimate benefit. *S. v. Smith,* 164 N. C., 475-480.

My conclusion is that there is nothing in this record to justify a reversal or any interference with the due course of justice.

STATE v. J. E. REAGAN.

(Filed 18 April, 1923.)

1. **Evidence—Demurrer—Nonsuit.**

Where the defendant in a criminal action demurs to the State's evidence, and upon the overruling of his motion introduces his evidence and again demurs after the close thereof, the entire evidence will be considered in the light most favorable to the prosecution.

2. **Larceny—Criminal Law—Evidence—Recent Possession—Presumptions—Jury—Trials.**

In an action for the larceny and receiving of an automobile, evidence that the car of the prosecutor had been taken from the place he had left it on the street of one town and within twenty-four hours thereafter was discovered by the prosecutor parked on the streets of a neighboring town with no one in it, but that the defendant had been seen several times walking by the car, watching if not guarding it, by a policeman who had been put upon watch by the prosecutor, and that the prosecutor, upon taking possession of his car found an overcoat therein with a letter in its pocket addressed to the defendant, together with the defendant's admission that the coat and letter were his, is evidence to be considered by the jury on the question whether the defendant was in the actual possession of the car at the time it was restored to the prosecutor.

3. **Larceny — Criminal Law — Evidence—Recent Possession—Issues of Fact.**

The presumption that the one in whose recent possession a stolen article has been found is the thief is not one of law, strictly speaking, but of fact, open to explanation by the one tried for the offense.

4. Appeal and Error—Objections and Exceptions—Contentions—Instruction.

The appellant is required to call to the attention of the trial judge a mistake or error in reciting his contentions to afford the judge an opportunity to correct an inadvertence, if any, and an exception thereto after verdict comes too late to be considered on appeal.

5. Appeal and Error — Harmless Error—Instructions—Character—Evidence.

Where testimony both of the good and bad character of the defendant tried for larceny and receiving has been introduced, and a State's witness has voluntarily qualified his testimony by stating his character was bad "in regard to his dealing in liquor," a charge of the Court saying in what respect the evidence is to be considered is not prejudicial to the defendant, and will not be held for reversible error.

APPEAL by defendant from *Harding, J.,* at November Term, 1922, of DAVIDSON.

The indictment charged the defendant with the larceny of a Ford car, and with receiving the car knowing it to have been stolen. The jury returned a general verdict of guilty. From the judgment pronounced the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

John D. Slawter for defendant.

ADAMS, J. The State offered evidence tending to show that Gary Long owned a Ford car which he left on Main Street in Thomasville about five o'clock on the afternoon of 14 January; that he returned from a picture show about two hours afterwards and found that his car had been stolen; that on the next day at 4 o'clock he saw it in one of the streets of Winston-Salem; that he made report of the larceny to police officers, one of whom while keeping watch noticed that a man who "looked like Mr. Reagan" walked by the car several times looking at it; that the officers later in the day turned the car over to the prosecutor Long, who found in it a raincoat, and in one of the pockets a letter addressed to the defendant; that the defendant admitted that the raincoat was his, and that he had received the letter, but said that the letter had been left in the pocket and the coat had been stolen.

The defendant offered evidence tending to show that he lived three miles from Winston-Salem, and was at home when the larceny occurred; that he had never seen the car and was not in Winston-Salem when it was found; that on the night of 6 January he parked his own car in front of the postoffice, throwing his raincoat over the radiator to protect it from the snow, and went away; and that upon his return the coat was

missing. Evidence was introduced in corroboration of the defendant's testimony. On cross-examination he admitted that he had been indicted three times for the larceny of automobiles, but that all the prosecutions except this one had been abandoned. There was evidence for the defendant tending to show that his character was good, and evidence for the State tending to show that his character was "bad for whiskey" and "bad for fooling with liquor."

First when the State had rested its case, and again at the conclusion of all the evidence, the defendant moved to dismiss the action as in case of nonsuit; the second motion must therefore be considered in the light, not merely of the evidence which was introduced by the State, but of all the evidence offered at the trial. *S. v. Killian*, 173 N. C., 792; *S. v. Brinkley*, 183 N. C., 720; *S. v. Pasour*, 183 N. C., 794. This evidence, when construed most favorably for the prosecution, tends to show that the car was stolen in Thomasville on Saturday and within twenty-four hours afterwards was found in the street near a cafe in Winston-Salem; that the defendant was watching, if not guarding, it; and that in the car at the time it was found and returned to the owner were the defendant's raincoat and a letter which, properly addressed to him, the defendant had received through the mail. We are at a loss to comprehend how the court could have disregarded the evidence or could have withdrawn it from the jury, as it was competent and directly relevant upon the question of the defendant's guilt. The fact that the defendant's raincoat and letter were in the car was evidence that the car had come into his possession, as *Judge Gaston* said, "by his own act or, at all events, with his undoubted concurrence" (*S. v. Smith*, 24 N. C., 402), and in either event such recent possession was evidence for the jury. In *S. v. Jennett*, 88 N. C., 666; *Ashe, J.*, said: "The State relies upon the fact of the stolen property being found in the defendant's possession, as raising a presumption that he is the thief. 'Presumptions,' says Mr. Archbold, 'are of three kinds: violent presumptions, where the facts and circumstances proved necessarily attend the fact proved; probable presumptions, where the facts and circumstances proved usually attend the fact proved; and light or rash presumptions, which, however, have no weight or validity at all.' He thus illustrates the distinction: 'Upon an indictment for stealing in a dwelling-house, if the defendant were apprehended a few yards from the outer door with the stolen goods in his possession, it must be a violent presumption of his having stolen them. But if they were found in his lodgings some time after the larceny, and he refused to account for his possession of them, this, together with proof of their having been stolen, would amount, not to a violent, but to a probable presumption merely. But if the property was not found recently after the loss, as, for instance, not until sixteen

months after, it would be but a light or rash presumption, and entitled to no weight,' and for this latter position he cites the case of *Rex v.* ....., 2 C. & P., 459, where it was held that the possession of stolen goods sixteen months after the loss was not of itself sufficient to warrant a conviction of the defendant. See, also, *S. v. Rights,* 82 N. C., 675."

The clause, "The law presumes the holder to be the thief," is not interpreted as a presumption of law in the strict sense of the term, but only as a presumption of fact which is open to explanation. The defendant testified by way of explanation that his coat had been stolen, but this circumstance did not impair the right of the State to have the jury pass upon the question of the defendant's recent possession, or of any presumption of fact arising therefrom. *S. v. McRae,* 120 N. C., 609; *S. v. Hullen,* 133 N. C., 657; *S. v. Anderson,* 162 N. C., 572; *S. v. Ford,* 175 N. C., 797. The case of *S. v. Lippard,* 183 N. C., 786, is not inconsistent with these authorities, inasmuch as the defendant in that case had never been found in possession of the stolen car. For the reasons given, we think the defendant's motion to dismiss the action as in case of nonsuit was properly disallowed.

The instruction which is the subject of the defendant's third exception was a recital of certain contentions made by the defendant and not excepted to at the trial. It has repeatedly been held that if the judge's statement of the contentions of the parties is objectionable the objection should be promptly called to his attention in order to give him an opportunity to correct any oversight or inadvertence of this character, and that such objection cannot be made first after the verdict. *S. v. Baldwin,* 184 N. C., 791; *S. v. Kincaid,* 183 N. C., 709; *S. v. Montgomery, ibid.,* 747; *S. v. Winder, ibid.,* 777; *S. v. Sheffield, ibid.,* 783; *Construction Co. v. R. R., ante,* 43.

The following instruction was given the jury: "The State contends it has shown he is a man of bad character in regard to his transactions with liquor. You can consider the evidence tending to show good character of the defendant, and the evidence tending to show bad character as modified by the witnesses in regard to his dealing with liquor."

The witnesses for the State voluntarily testified in what respect the defendant's character was bad, and this they had a right to do. The instruction that the jury should consider evidence tending to show the defendant's "bad character as modified by the witnesses in regard to his dealing in liquor" can be construed only as limiting the consideration of such evidence to the particular respect in which the witnesses testified his character was bad, and this certainly was not prejudicial to the defendant. *S. v. Hairston,* 121 N. C., 579; *S. v. Wilson,* 158 N. C., 599; *Edwards v. Price,* 162 N. C., 244; *S. v. Melton,* 166 N. C., 442; *S. v.*

Summers, 173 N. C., 775; *S. v. McKinney*, 175 N. C., 784; *S. v. Butler*, 177 N. C., 585.

We have carefully examined the record and considered all the exceptions, and we find no reversible error.

No error.

STATE v. B. H. HEDGECOCK.

(Filed 18 April, 1923.)

1. Indictment—False Entries—Fraud and Deceit—Banks—Criminal Law.

Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the State of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of the statute under which the indictment had been drawn.

2. Same—Persons to Jurors Unknown—Statutes.

An indictment charging the employee with the indictable offense of making a false entry on the books of a bank for which he was employed need not necessarily specify all those whom he has thereby intended to defraud; and where it has named the officers of the bank and a depositor, "and other persons to the jurors unknown," it is sufficient to show that the false entry was entered to deceive the bank examiners in concealing his defalcation, who were present making an examination of his books, both under the common law and the statute, C. S., 4621, 4677.

3. Same—Counts—Verdict.

Where the indictment charges but the one criminal offense of fraud to deceive "persons to the jurors unknown" in a false entry made by the defendant on the books of the bank and there is evidence upon the trial as to the identity of those "persons unknown" to the grand jury, finding a true bill, a general verdict of guilty will be sustained.

4. Same—Bill of Particulars.

Where a bank employee is charged with the indictable offense of making false entries upon the books of the bank in fraud or deceit of "other persons to the jurors unknown," the defendant should make his motion to the discretion of the trial judge for a bill of particulars requiring the name of these unknown persons, and his failure to do so will be deemed a waiver of his right. C. S., 4613.

5. Common Law—Procedure—Technicalities—Statutes.

The refined technicalities of the procedure at common law, in both civil and criminal cases, have most entirely, if not quite, been abolished by our statute. C. S., 4610-4625.

APPEAL by defendant from *Harding, J.*, at December Term, 1922, of GUILFORD.

STATE *v.* HEDGECOCK.

The defendant was convicted at December Term, 1922, of Guilford of the statutory offense of "making false entries with intent to defraud" on the books of the Home Banking Company of High Point, and from the judgment he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. P. Bynum, T. J. Gold, S. S. Alderman, and R. C. Strudwick for defendant.

CLARK, C. J. The indictment in this case is as follows: "The jurors for the State, upon their oath present that B. H. Hedgecock (being cashier of the Home Banking Company), late of the county of Guilford, on 22 April, in the year of our Lord one thousand nine hundred and twenty-two, with force and arms, at and in the county aforesaid, did unlawfully, willfully, and feloniously make a false entry on the books of the Home Banking Company by charging the account of M. J. Wrenn with $10,000 on the savings ledger, thereby reducing his balance from $24,242.50 to $14,242.50, with the intent to unlawfully, willfully, and feloniously defraud and injure the Home Banking Company, a corporation incorporated under the laws of the State of North Carolina, and M. J. Wrenn and other persons whose names are to the jurors unknown, and to deceive certain officers and agents of the Home Banking Company and other persons to the jurors unknown. Against the form of the statute in such case made and provided, and against the peace and dignity of the State."

After the verdict of guilty, the defendant moved for an arrest of judgment upon the ground that the indictment is defective in that it fails to state, with certainty, the facts necessary to constitute the crime with which the defendant was charged. The motion was overruled. There were several exceptions to the evidence, but they do not require discussion. The only exception to the charge is as follows:

"Gentlemen of the jury, the court charges you if you find by the evidence in this case beyond a reasonable doubt that when the defendant made the entry on the savings account in the book of the Home Banking Company, which he admits, of $10,000, charging that to the account of M. J. Wrenn, after having admitted that, if you find, if the State has satisfied you beyond a reasonable doubt that that entry was false, and that at the time he made it you find it was false, and he did it with the intent to defraud and injure either the bank or Mr. Wrenn, or to deceive the officers of that bank, or to deceive the bank examiners who were there to examine the bank, if the State has satisfied you beyond a reasonable doubt of those facts, then it would be your duty to convict the defendant."

The defendant contends that the judgment should be arrested because

the indictment was fatally defective in that (1) it is not alleged that the Home Banking Company was at the time of the alleged offense or at any time had been a bank in the definition of a bank contained in the statute under which this indictment is drawn. But the indictment does allege that the Home Banking Company is a corporation incorporated under the laws of the State of North Carolina, and Laws 1921, ch. 4, sec. 81, forbids any person, association, etc., to so hold themselves out by advertising or otherwise unless they are such. The defendant had the fullest knowledge that the Home Banking Company at the time of the alleged offense was engaged in the banking business.

(2) The defendant further contends that the indictment is fatally defective because it is not alleged at the time of the alleged offense the Home Banking Company was engaged in the banking business; and further, that charging the making of a "false entry" by defendant without more appearing is not sufficient. The allegations in the indictment are of sufficient information to defendant within the most technical rules of the law.

The defendant in his argument here seemed to rest his case chiefly upon the ground that the court in the charge told the jury that "if the defendant made the entry on the savings account in the book of the Home Banking Company, which he admits, of $10,000, charging that to the account of M. J. Wrenn, after having admitted that, if you find, if the State has satisfied you beyond a reasonable doubt that that entry was false, and that at the time he made it you find it was false, and he did it with the intent to defraud and injure either the bank or Mr. Wrenn, or to deceive the officers of that bank, or to deceive the bank examiners who were there to examine the bank, if the State has satisfied you beyond a reasonable doubt of those facts, then it would be your duty to convict the defendant." The defendant contends that the use of the words in this charge "or to deceive the bank examiners who were there to examine the bank" was erroneous, because the defendant had no notice of indictment on this charge, but the language of the indictment, "and to deceive certain officers and agents of the Home Banking Company and other persons to the jurors unknown" was full notice to him in connection with other words in the indictment for the crime with which he was charged. The judge, in using the words the defendant objects to, "or to deceive the bank examiners who were there to examine the bank," was referring to the evidence which tended to prove defendant's intent to deceive certain officers and agents of the Home Banking Company and "other persons to the jurors unknown." He was not referring to the exact language of the indictment, but to the fact that the persons named, to wit: officers and agents of the banking company and bank examiners who were there to examine the bank, were intended to be deceived.

In other words, the defendant is attempting to escape liability for this offense of which he was duly convicted upon ample evidence upon the contention that the "bank examiners who were there to examine the bank" could not prove to any extent the charge that the false entry was made to deceive "persons to the jurors unknown," and that it was essential that such bank examiners should be named in the indictment.

In the highly technical common-law procedure, both criminal and civil, now almost entirely, if not altogether, abolished here, C. S., 4610-4625, especially secs. 4623, 4625—and, indeed, everywhere—there were many things to be charged in an indictment—besides, for instance, the cumbersome allegations in an indictment for murder that the defendant was "moved and instigated by the devil," and the depth and nature of the wound, and the value of the weapon, and that the party did languish, etc., etc. The reason given for many of these "refinements" was, first, that the defendant should have information; and second, there should be earmarks by which he should be protected from another indictment for the same offense, but neither of these reasons would apply as to the exception here made, for there is but one offense charged, and that is fully and specifically stated so that the defendant knew well of what he was charged, and the record itself sets it out and will prevent his being again indicted for the same offense.

In this case the State's evidence is that the discrepancy of a shortage in the bank was over $123,000, and the defendant admitted in his evidence and in writing "false entries" of nearly $80,000. This particular item of false charge whereby the credit of Wrenn was reduced by an alleged check of $10,000, the defendant, while admitting nearly $80,000 of false entries in order to make his books show up, denied this specific one upon the ground that there was such a check, but that he had lost it and he could not produce it. Wrenn and his wife testified that he had given no such check, and Swaim, bookkeeper of the bank, testified that he saw the defendant when he was charging up Wrenn's account with it, and told him Wrenn had made no such check, and the defendant said, "No, he was doing it, taking this $10,000 off in order to bring the savings ledger down with the general ledger, the controlling book of the bank. He said that the defendant stated that the bank examiners had told him that he was short in his checking ledger that morning, and he was doing this in order to bring down some of the shortage that was found in the checking ledger."

This witness testified that Hedgecock did not have any $10,000 check to cover the $10,000 which he charged up against Wrenn's account. The State also filed an itemized statement which the defendant had given to I. W. Bingham when he audited the books of the Home Banking Company and found a shortage of $123,000, and that at the bottom of

this itemized statement (which amounted to about $80,000) the defendant made the following statement: "To the best of my knowledge and belief these are all the false entries that I have made. (Signed) Basil H. Hedgecock."

There was very full evidence as to the examination of the bank by the State bank examiners, H. L. Newbold and R. E. Kerr; also by I. W. Bingham and W. S. Courcy, auditors of the Scott, Charnley Company; and the charge of the court was very full and explicit, and the sole exception to the charge is as above given.

This is not a case where there are different acts of the same nature which are usually set out in separate counts, and which may be joined in the same bill, but there is only one act charged, and there are different persons referred to who were intended to be defrauded or deceived. The verdict of guilty, therefore, settled that the defendant did the act, and if on the evidence there were other persons intended to be defrauded or deceived, and were thus defrauded or deceived, the conviction under the verdict is sufficient. It is not necessary that it should be specified in the verdict what persons were, and which were not, defrauded or deceived when the verdict finds that any of them were in fact so defrauded or deceived.

Where there are separate counts, a general verdict would be sufficient, though the acts are different if of such nature that they could be joined as separate counts in the same bill. For a stronger reason, where there is but one act charged, as in this case, but there are divers persons named or referred to as other "persons to the jurors unknown," as having been defrauded or deceived, a verdict of guilty is sufficient if there is evidence sufficient to convict of the intent to defraud or deceive any one of those named, or "any person or persons to the jurors unknown."

Even if the indictment had simply charged an intent to cheat and defraud "persons unknown," without naming any one, it would have been sufficient. *S. v. Faucett*, 20 N. C., 239. Under the former exceedingly technical rules appertaining to indictments, it was held by *Ruffin, C. J.*, in *S. v. Muse*, 20 N. C., 463, that in a warrant for retailing without license near a church it was not necessary to name any person or persons to whom the article was sold, because each act of selling was not a distinct offense, but only one offense is committed.

In the present case there is but one act charged, and it is alleged to have been against several persons in the alternative, and therefore, even under the former system, the charge would have been sufficient.

In *S. v. Brown*, 170 N. C., 714, where the subject is fully discussed, it was held that it was always sufficient to charge the sale of intoxicating liquor to have been made to a "person or persons to the jurors unknown," and this independent of the provision in the statute of 1913, now C. S.,

3383, which dispenses with the requirement to name any person to whom a sale is made; which statute was held valid in that case, and has been often cited since.

In like manner, C. S., 4621, provides that "in any case where an intent to defraud (which is the case here) is required to constitute the offense of forgery, or *any other offense whatever,* it is sufficient to allege in the indictment an intent to defraud without naming therein the particular persons or bodies corporate intended to be defrauded."

This statute would validate this indictment if there had been any defect in alleging the offense simply to have been an intent to defraud any "person or persons to the jurors unknown."

In like manner, in Rev., 3353, now C. S., 4677, it is provided: "It shall be sufficient to allege in the indictment an intent to defraud without naming therein the particular person or body corporate intended to be defrauded."

In Rev., 3453, now C. S., 4287, it is provided as to indictments for disposal of mortgaged property: "In all indictments for violation of the provisions of this section it shall not be necessary to allege or prove the person to whom any sale or disposition of the property was made"; and there are other offenses as to which there are similar provisions. In *S. v. Brown,* 170 N. C., 715, sustaining the constitutionality of the act which dispenses with the necessity of naming any person to whom the sale of liquor has been made (now C. S., 3383), it was said that the same ruling had been "sustained in *S. v. Ridge,* 125 N. C., 658; *S. v. Howard* (the *'Gold Brick' case*), 129 N. C., 660; *S. v. Taylor,* 131 N. C., 714; and the indictment was held sufficient in several other cases cited in Pell's Revisal under section 3432. *S. v. Burke,* 108 N. C., 750; *S. v. Skidmore,* 109 N. C., 796, and others."

Indeed, in *S. v. Little,* 171 N. C., 806, *Hoke, J.,* said: "As a matter of form, in respect to the feature of the charge, that the unlawful delivery of the quantity (of liquor) specified was to 'a person or persons to the jurors unknown,' the bill of indictment has been held sufficient. *S. v. Dowdy,* 145 N. C., 432; *S. v. Tisdale, ibid.,* 422 (which were prior to the act of 1913, now C. S., 3383), and the principal question presented is whether, on the facts contained in the special verdict, the defendant is guilty of the offense, under the statute, charged against him in the bill"—which was a violation of the law against transporting intoxicating liquors.

Besides, there is this consideration, that if it had been possible that upon the facts of this case there was the slightest lack of information as to the persons whom it was charged the defendant intended to defraud or deceive, C. S., 4613, provides: "In all indictments when further information, not required to be set out therein, is desirable for

the better defense of the accused, the court, upon motion, may in its discretion require the solicitor to furnish the bill of particulars for such matters."

Under the statutes and authorities above cited, it is not necessary that the names of all persons who could possibly have been deceived or defrauded should be set out. The charge "or other persons to the jurors unknown" was sufficient, but if the defendant had needed further information, he waived the requirement that their names should be given to him before pleading his defense by not availing himself of this statute. It may well be that their names were unknown to the grand jury, and proving their names before the trial jury could not prejudice the defendant.

We can only account for the presentation on this occasion of a technicality, which is not sustained by our statutes and procedure, by the fact that it is apparent from the testimony and the incidents of the trial that the defendant having admitted that he made the entry charged, and there being no evidence in the record which would have justified his acquittal, the line of defense presented by his able and distinguished counsel was the only one that could be discovered.

Chief Justice Ruffin, in *S. v. Moses*, 13 N. C., at p. 463, as far back as 1830, in reference to the act of 1811, ch. 809 (now C. S., 4623), said that it was "enacted that in all criminal prosecutions in the Superior Courts it shall be sufficient that the indictment contain the charge in a plain, intelligible, and explicit manner; and no judgment shall be arrested for or by reason of any informality or refinement, when there appears to be sufficient in the face of the indictment to induce the court to proceed to judgment." And he added these memorable words, which express the best judicial thought of his day, and which since has obtained everywhere: "This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality, and refinement which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law had before called nice objections of this sort a disease of the law, and a reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, especially in those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them, and only require the substance, that is, a direct averment of those facts and circumstances which constitute the crime, to be set forth."

The jury found, upon the evidence, that the defendant made the false entry on the books of the bank as charged, and with the intent to defraud

and deceive. It was unnecessary under our statutes to charge the intent to defraud any particular person. It was sufficient to charge that the defendant intended to defraud and deceive other persons than those named, and who were to the jurors unknown, and a conviction upon a general verdict was sufficient without naming unknown persons, and, in fact, the names of the bank examiners were in evidence on the trial and uncontradicted.

No error.

STATE v. H. D. EDMONDS.

(Filed 18 April, 1923.)

1. Criminal Law — Incendiary—Fires—Evidence—Questions for Jury—Nonsuit.

Upon a trial of defendant for setting fire to and destroying his stock of merchandise, there was evidence tending to show that the corporation of which the defendant was largely the owner was heavily indebted and insured, and that the fire had occurred about 10:30 p. m. shortly after the defendant had been in the store; that the firemen found the store locked, and that no entrance had been forced except those they had made to enter to fight the fires, and that the merchandise had the odor of kerosene which the defendant could not explain, etc.: *Held*, sufficient upon which to deny the defendant's motion as of nonsuit, and to take the case to the jury.

2. Criminal Law—Evidence—Corroborative Evidence.

Where, upon a trial of defendant for setting fire to his own store to get the insurance thereon, there is conflicting evidence of the quantity of the merchandise in the store at the time of the fire, and the defendant has become a bankrupt, it is competent for the solicitor to ask the defendant what had become of the stock of goods with reference to the bankruptcy, for the purpose of impeaching his testimony.

3. Evidence—Hearsay—Appeal and Error.

What an insurance agent said to a clerk or agent on delivering a policy of fire insurance is hearsay when testified to by the clerk, and incompetent as direct evidence; and if there was error in the court's excluding it, the error is cured by the agent afterwards testifying as to what he had said to the clerk.

4. Criminal Law—Evidence—Motive—Identification.

While motive for the commission of a crime is not necessary to be directly proved, the existence of the motive may be evidence to show the degree of the crime, and the identity of the culprit.

5. Appeal and Error—Objections and Exceptions—Evidence—Harmless Error.

The appellant, by objection, must call to the attention of the trial judge an erroneous statement he has made in stating his contentions to the jury in time to afford the judge opportunity for correction, and an exception otherwise taken will not be considered on appeal.

APPEAL by defendant from *Brock, J.*, at December Term, 1922, of FORSYTH.

The defendant was convicted of setting fire to a store building, at December Term, 1922, of Forsyth Superior Court, Hon. W. E. Brock presiding, and from the judgment upon such conviction appealed to this Court.

The defendant's principal exceptions were exceptions one and four, which were directed to the refusal of the judge to grant judgment as of nonsuit against the State at the conclusion of the State's evidence, and again at the conclusion of all the evidence.

The State's evidence tended to show that on 14 April, 1920, the defendant was operating a store on Main Street in the city of Winston-Salem, selling ladies' and children's wearing apparel, shoes, hats, and men's clothing—a general line of goods. On the night of that day there was a celebration in the city. The store of Edmonds was a two-story, with basement, building, fronting on Main Street, and extending back about sixty feet. On the second floor the defendant kept ready-to-wear goods, children's apparel, and ladies' ready-to-wear, waists, etc. Much of these goods were on tables near the back end of the second floor.

At 10:46 on the night of 14 April, 1920, the alarm of fire called the fire department to this store. What occurred when part of the fire department arrived there is thus told by H. E. Nissen, chief of the fire department, who testified: "The fire had not made any considerable headway when I got there, it had almost burnt through the ceiling, but had not gotten any headway into the blind attic above. Lieutenant Brown headed one chemical line in the rear and I headed another in the front door and up the stairway. I detected the odor of hot kerosene oil as soon as I started up the stairway. The fire was quickly extinguished with chemicals, but the odor of kerosene was still prevalent and pervaded the upper floor to quite an extent. I found some partially burned garments that had the odor of kerosene on them. There was a skylight about the center of the upper floor that went above the roof; I examined that and found it intact. In order to get rid of the smoke, I threw out of the rear window a lot of the stuff that was partially burnt, middy blouse, dress, and perhaps something else. H. D. Edmonds came in the burning building and inquired if all the things were there, and I told him I had pitched a considerable quantity out of that window. Later

on I missed Edmonds, and inquired where he went, and was told that he had gone around the building, and I went around there and found Edmonds; he had a garment, and said to me, 'What is this on here?' I smelled it and said, 'Kerosene, like the others.' He stated it did not smell like kerosene to him. I do not recall that there was any one with Edmonds at the time. Some of the goods that smelled like kerosene oil I took out of the store that night and later on put them in a can and sealed them up. These are the cans, which have been sealed ever since then, and the garments. (Cans opened, goods taken out and introduced in evidence and exhibited to the jury.) When Edmonds came to the store that night, he told me that he had been out of town most of that day; I asked him where he kept his matches; he said he didn't keep any around there; I asked him if he kept any oily rags; he said 'No'; I asked him if they had been painting around there any; he said 'No,' but later he said they had been varnishing. I asked him if any of them smoked around there, and he said they did not. However, in a few minutes he rolled a cigarette and lit it; I asked him where they kept the kerosene oil, and he said they did not have any. I told him there was some there, and the building had been set on fire; he hung his head and said he did not know anything about it. I asked him who had the key to the store, and he said he had the only key to the store, but later he said the clerk had a key—I won't say whether that was the next day or some subsequent date after the fire, I do not recall. He stated that he had been in the store more than once that night, is my recollection, but it is not clear as to the number of times nor the hours. The building was two-story and basement, which was used for store room, and there was very little in it; the first and second floors were not filled, did not seem to have any great quantity of stock there. I examined the entrances after the fire and found no evidence of breaking in except the window and door which were broken open in extinguishing the fire. Captain Cofer and I also examined the basement door leading to the outside, and found it fastened, and found the window closed. I examined all of the openings; I found no windows broken except those broken by the firemen. I went in the front, the floor is flush with the sidewalk; Lieutenant Brown went in on a ladder on the top floor; the building is three stories in the rear."

M. J. Brown, captain of fire company No. 2, who broke out a window at the back end of the store and fought the fire through that window, opening into the second floor, likewise testified to the strong odor of kerosene about that room.

The defendant Edmonds had $35,700 of insurance on his stock. An inventory was taken on 1 January, 1920, which showed a stock of $23,000. An inventory after the fire, but before the adjusters came,

showed $25,440.71. Upon this stock Edmonds was indebted $24,500. Edmonds himself was at this store twice that night after it had been closed, the first time with his wife and children; the second time he went alone to the building after the celebration had ended, he himself claiming that he returned at that time only to turn out the lights, which were left on in front of the building in accordance with the request of the managers of the celebration. The time at which he returned alone, by the State's evidence, is fixed at somewhere about 10 o'clock or later. Defendant claimed that it was about nine o'clock. He some time previous had complained to the police that some one was entering his store and stealing his goods. He said at that time that they entered through the basement window. Policeman Cofer had, however, arranged that window so that if any one entered he could detect that entry without difficulty, and the night of the fire no one had entered that window.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

J. H. Folger and Holton & Holton for defendant.

WALKER, J. As to the motion for a nonsuit, the refusal of which is the basis of exceptions Nos. 1 and 4: We must construe the evidence most favorably to the State, in passing upon such a motion, is the invariable rule of the law. *Lynch v. Dewey*, 175 N. C., 152. It is obvious from the above short recapitulation of the evidence that the defendant was the only person who had any motive for setting fire to this store and the goods. It also appears that he had an opportunity to set fire to them, when he returned to the store alone. It is obvious, also, from the use of kerosene oil, that the goods were purposely set fire to and not accidentally burned. This evidence was amply sufficient to carry the case to the jury upon the defendant's guilt or innocence, and if his own testimony, and that of his wife, should be believed, or accepted as true, he did not set fire to the goods. The motion for a nonsuit, therefore, was properly denied, as there was raised a clear issue of fact, which the jury was properly required to pass upon. The jury did pass upon it, and as their verdict, they found him guilty. From the judgment thereon he appealed.

Exception 2: The defendant H. D. Edmonds began business in his own name on 8 August, 1919. The business, however, was incorporated 1 January, 1920, as the H. D. Edmonds Clothing Company, with H. D. Edmonds manager of it. After the fire, the concern was forced into bankruptcy. The defendant was being cross-examined by the solicitor with reference to this bankruptcy, and with a view of impeaching him, when he asked him: "What went with all that stock of goods from

14 April until September?" The defendant objected, but the court admitted the answer for the purpose of impeaching the witness only. Witness's answer was: "Well, I don't know; couldn't tell you exactly what went with it. All I got hold of (which was the company's money), I deposited in the Farmers Bank and checked it out to pay my creditors." This question was entirely proper in the cross-examination for the purpose of impeaching the witness.

Exception 3: B. A. Manion, clerk for the Edmonds Clothing Company, was being examined. It appeared that an extra policy of insurance amounting to $2,500 had been taken out on 15 March, 1920. Benbow Jones was the agent of the company which issued this policy. On Manion's direct examination he was asked by defendant's counsel: "What did the man who brought that policy there say about it?" The State objected, and the objection was sustained. Benbow Jones had not at that time been upon the stand, so this evidence was not admissible as corroborating him. It was simply a declaration by a third party, and no part of the *res gestæ*. The defendant afterwards placed Benbow Jones on the stand, who testified fully in regard to this policy. This cured the error, if any.

Exception 5 was to a part of the judge's charge in which he was stating a contention of the State. It is clear, we think, that in the state of the record this exception is not tenable. It was certainly founded upon evidence that appeared in the cause.

There was ample evidence from which the State might reasonably argue, and the jury find, that Edmonds was the last man in the store that night before the fire broke out, and there was no evidence that there had been any entrance into the building that night by any one, but Edmonds and his clerk, though there was evidence that Edmonds showed J. J. Cofer, and perhaps others, where some person trying to enter the store through the basement, had drawn the screws from the hinges of a door, through which one could go up from the store-room, which is in the basement, but the witness Cofer testified that you could not open the door by removing the hinges, because when the door was closed they were on the inside. Defendant told the witness Fred Lindsay, a traveling salesman who sold to him, that he had between $25,000 and $30,000 worth of goods in the store a short time before the fire. Lindsay was of the opinion, as he testified, that there was not more than between $5,000 and $10,000, and he would not give more than $5,000 for the goods if he were buying them. The policemen testified that the building was entirely closed at all doors and windows when they answered the alarm for fire, and reached the same, and that no one could enter it without breaking in, and there was no evidence of any breaking, or attempt to break in, if we omit the trivial circumstances as to the door

in the basement, which may have been, and likely was, but a preparation by Edmonds himself for some apparently reasonable explanation that he even then thought would be necessary to allay suspicion which would certainly rest upon him. There are numerous other circumstances, more or less cogent and convincing as evidence, that Edmonds is the guilty perpetrator of this nefarious attempt to cheat and defraud the insurance companies, and thereby get money to pay his large indebtedness, defray expenses, and cover heavy impending losses, he evidently being very much embarrassed by pressing debts and liabilities at the time, and in his haste he did not stop to calculate the destruction of his own property, or that in which he was largely interested, and the consequent risk he was taking in burning all adjoining property and eventually starting a conflagration which would likely have imperiled the entire city of Winston, and involve it in an appalling catastrophe, which we cannot contemplate except with undisguised horror and the severest condemnation for the cold, calculating, and reckless commission of crime, fraught with such disastrous consequences, and which threatened to entail so much destruction and such untold losses on the community, and the proud and rejoicing city, then in the act of celebrating the greatest event of its history, and he cared not, if, as once said, "among its proud arches the fires of ruin glowed." He took advantage of such an occasion to apply the torch to his own, and thus kindle the fires of destruction, in that beautiful and prosperous city, so that while others might suffer enormously, he could pay his debts and perhaps have something left. He looked upon the insurance money with a covetous and even avaricious eye. So great was the crime thus charged against the defendant, and so heinous, that we should be very careful to examine the evidence with the utmost scrutiny, but after doing so, we find that the proof of guilt is so strong and convincing, not to say conclusive, that it would be impossible to think, with seriousness, of dismissing the prosecution, which is asked to be done. The prisoner had the motive to commit the offense, because of the large stock of goods he pretended to have, and upon which, if they were destroyed by fire, he expected to realize handsomely. When told of the kerosene oil, he could not explain its presence, but dropped his head in token of his conscious guilt.

The prisoner was a large stockholder in the company, and had, therefore, a considerable interest in its general affairs, and especially in its stock of goods. His motive in burning it is, therefore, apparent. Motive is not always necessary to be proved, but if often, as it is in this case, evidence of guilt, as it tends to show the identity of the person who committed the crime.

Motive is not an indispensable, and not even an essential, element of this crime, but even when this is so, the existence of a motive may be

evidence to show the degree of the crime or to establish the identity of the person as the culprit, *S. v. Adams,* 138 N. C., 688; *S. v. Wilcox,* 132 N. C., 1143; *S. v. Adams,* 136 N. C., 620, but it is hardly required to show any motive here, as the other evidence of the prisoner's guilt is so very conclusive.

Exception number three, as to the Manion insurance policy. The evidence concerning this policy was insignificant, as compared with the other overwhelming proof, and may be left out of consideration without in the least impairing the strength of the other evidence against the prisoner.

Exception number five is also without any force or merit. It is the old and time-worn objection we so often meet with, and which is that the judge did not state the contentions correctly. If he did fail in this respect, he should have been requested to correct the error. The traveling salesman, who sold goods often to the prisoner, testified that, while he stated that he had $25,000 or $30,000 of insurance, he (the witness) did not think his stock was worth more than "near $5,000," a great disparity in the true value and the insurance.

There was clearly no error, and we must decline to change the judgment.

No error.

STATE v. R. M. DIXON, ALIAS ELLIS NASSAR.

(Filed 25 April, 1923.)

1. Forgery—Criminal Law—Evidence—Constitutional Law—Banks and Banking.

Where the defendant is tried for forgery and fraudulently uttering and publishing forged checks, deposited by him with a forwarding bank for collection, the proper officer of the forwarding bank is competent to testify that the checks had accordingly been forwarded to the payer bank, and had been protested for nonpayment and returned, and in corroboration offer the checks in evidence with the notary's certificate of protest; but the proper officer of the payer bank is only competent to testify that the maker of the check had no account there, under the constitutional guarantee that the accused in all criminal actions shall have the right to confront the accuser and witnesses, etc. Const., Art. I, sec. 11.

2. Same.

The right of the accused in a criminal action to confront the accuser and witnesses extends to his having them present before the jury at the trial, and, under oath, have them testify to matters within their own knowledge, subject to the test of a competent cross-examination.

3. Same—Instructions—Appeal and Error—Prejudicial Error.

Where the indictment charges the defendant with the forgery of checks, and with fraudulently altering and publishing them, it is required that

the State show that the checks were falsely made or uttered with a fraudulent intent, and that they were capable of effectuating a fraud; and where the evidence upon the trial permits a finding by the jury that the payee of the check endorsed was a fictitious person, it is necessary for the State to show that the endorser, having the check forwarded for collection, himself signed the name of the fictitious person with the intent to defraud; or, if otherwise, that he was unauthorized to sign the maker's name; and an instruction by the court that it could make no difference whether the maker was a real or fictitious person, if the State had satisfied the jury beyond a reasonable doubt that the defendant was the real maker of the checks, is reversible error.

APPEAL by defendant from *Harding, J.*, at October Term, 1922, of GUILFORD.

Criminal prosecution, tried upon an indictment charging the defendant with forgery and with fraudulently uttering and publishing two forged checks, one drawn on the Merchants Bank and Trust Company of Winston-Salem, N. C., for $210, payable to the order of R. M. Dixon and signed A. C. Corbett, and the other drawn on the same bank for $198, payable to the order of R. M. Dixon, and signed A. C. Corbett.

These two checks were presented by the defendant at the Greensboro National Bank for deposit, and were left there by him for collection, he being told at the time by the teller that it was contrary to the rules of the bank to allow strangers to draw money against uncollected funds, and that he would send the checks to Winston-Salem for collection and when collected would place the proceeds to the defendant's credit. The defendant gave his name to the teller as R. M. Dixon, and endorsed that name upon the back of the checks at the time of their delivery to the teller.

The checks were forwarded in due course of mail to the bank at Winston-Salem for collection, and, according to the testimony of the teller of the Greensboro bank, were returned unpaid and protested, with the reason of the protest stated thereon as "No account." Defendant objected to this evidence, and duly noted an exception.

The defendant did not procure from the Greensboro bank any money by reason of his deposit of the checks, but, as testified to by the teller, he simply deposited them for collection with the understanding that they were so deposited, and that he would not be permitted to draw any funds from the Greensboro bank unless and until the said checks had been reported by the bank at Winston-Salem as paid.

His Honor charged the jury that it could make no difference whether A. C. Corbett was a real or fictitious person if the State had satisfied them beyond a reasonable doubt that the defendant was the real maker of the checks, they would convict him if they further found the checks were made and executed with the requisite intent to defraud. Defend-

ant excepted. From an adverse verdict and judgment of two years in the State Prison, the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Louis W. Gaylord and William P. Bynum for defendant.

STACY, J. For the purpose of showing that the checks in question were made out in the name of a fictitious person, or that they were forged by the defendant, the teller of the Greensboro bank, over objection, was allowed to give the reason for their nonpayment by the Winston-Salem bank, as shown by the protest, to be "No account"—meaning that no account was carried at said bank in the name of A. C. Corbett. It was permissible for the witness to state that the checks had been sent to the Winston-Salem bank for collection, and that they had been protested for nonpayment and returned. In corroboration of this testimony, we see no reason why the checks themselves, together with the notary's certificate, should not have been offered in evidence. *S. v. McCormick,* 57 Kan., 440; 3 R. C. L., 1328. But this was not done, and the objection is based upon other grounds. The prosecution was seeking to accomplish quite a different end. In the admission of the evidence, as offered, we think there was error. The reason for the protest of the present checks, as stated by the notary, considering the purpose for which it was used, if not hearsay on his part, was a mere *ipse dixit* of a third person who was not offered as a witness at the trial so that such memorandum could be considered as supporting, or in corroboration of his evidence. *Farrington v. State,* 10 Ohio, 354; *S. v. Behrman,* 114 N. C., 797; *S. v. Dowdy,* 145 N. C., 432; 26 C. J., 963.

While doubtless the same conclusion would be reached in the case of a foreign bill of exchange, which is required by our law to be protested for nonacceptance or nonpayment (C. S., 3134 and 3135), yet it may be observed that, in the case at bar, no protest of the instant checks was necessary (C. S., 3134), though it was permissible under C. S., 3100; 3 R. C. L., 1327. However, as to this last proposition, we make no present decision, because it is not before us, and what we have said must be understood as being confined to the questions raised by the defendant's appeal. This is a criminal prosecution, not a civil action involving a construction of the law merchant, and the State is seeking to prove by the evidence now in question, more than presentment, demand, and protest of the checks for nonpayment or dishonor. 3 R. C. L., 1328; *S. v. Behrman, supra.* For these purposes, the evidence may be competent (*Gordon v. Price,* 32 N. C., 385; C. S., 2979); but, in a criminal action, it must be remembered that the defendant is clothed with a

constitutional right of confrontation. 3 R. C. L., 1328. This may not be taken away, even by statute, and assuredly not when the legislative enactment purports to deal only with negotiable instruments and the civil law of evidence. *Dakin v. Graves*, 48 N. H., 45; 96 Am. Dec., 606, note. In this connection it may be well to note that section 10, chapter 13, of the Revised Statutes of North Carolina (1837), making the notary's certificate of protest prima facie evidence against the drawer, of a demand on the drawee and notice to the drawer, apparently has not been brought forward and made a part of our present uniform negotiable-instruments law (adopted in 1899). But back to the subject in hand.

"In all criminal prosecutions every man has the right to be informed of the accusation against him, and to confront the accusers and witnesses with other testimony." Const., Art. I, sec. 11. "We take it that the word *confront* does not simply secure to the accused the privilege of examining witnesses in his behalf, but is an affirmance of the rule of the common law that in trials by jury the witness must be present before the jury and accused, so that he may be confronted; that is, put face to face." *Pearson, C. J.*, in *S. v. Thomas*, 64 N. C., 74. And further, the defendant is entitled to have the testimony offered against him given under the sanction of an oath, and to require the witnesses to speak of their own knowledge and to be subjected to the test of a competent cross-examination.

The defendant also assigns as error the charge of his Honor that it could make no difference whether A. C. Corbett, the purported maker of the checks, was a real or fictitious person, if the defendant actually signed such name to the checks with intent to defraud the officers of the bank or any other person. If the drawer had no existence, of necessity, the name must have been affixed by some one without authority, and if this were done by the defendant with the purpose and intent to defraud—the instruments being sufficient in form to import legal liability—an indictable forgery would have been committed. *Barnes v. Crawford*, 115 N. C., 76; *Williams v. State*, 126 Ala., 50; *Maloney v. State*, 18 Ann. Cas., 480; 2 Words and Phrases, 614. "Forgery may be committed of any writing which, if genuine, would operate as the foundation of another man's liability, or evidence of his right. It is sufficient if the instrument forged, supposing it to be genuine, might have been prejudicial." 19 Cyc., 1380; *S. v. Webster*, 32 L. R. A. (N. S.), 337. Three elements are necessary to constitute the offense: (1) There must be a false making or other alteration of some instrument in writing; (2) there must be a fraudulent intent; and (3) the instrument must be apparently capable of effecting a fraud. 19 Cyc., 1373. But if A. C. Corbett, the purported maker, were a real person and actually existing, the State would be required to show not only that the signatures in

question were not genuine, but that they were made by the defendant without authority. *People v. Lundin,* 117 Cal., 124; *S. v. Swan,* 60 Kan., 461; 19 Cyc., 1411. To show that the defendant signed the name of some other person to an instrument, and that he passed such instrument as genuine, is not sufficient to establish the commission of a crime. It must still be shown that it was a false instrument, and this is not established until it is shown that the person who signed another's name did so without authority. *People v. Whiteman,* 114 Cal., 338. In this respect, we think his Honor's charge was prejudicial to the defendant.

For the errors, as indicated, there must be a new trial or a *venire de novo;* and it is so ordered.

New trial.

STATE v. TOM BUTNER.

(Filed 25 April, 1923.)

1. Appeal and Error—Settlement of Case—Stenographer's Notes.

The trial judge must settle the case on appeal to the Supreme Court within the time allowed by law, whether the stenographer has transcribed her notes of the evidence on the trial or not.

2. Same—Extension of Time.

The failure or inability of the official stenographer at the trial to transcribe the notes thereof in time, does not excuse the appellant for failure to make out and serve his case within the time allowed by law. The excessive time allowed for this purpose in some instances is commented upon unfavorably.

3. Same—Record Proper—Docketing—Certiorari—Discretion of Court.

Where the appellant has been unable to bring up his case on appeal within the time allowed him by law, he must comply with the rule to docket the record proper and move for a *certiorari,* so that the Supreme Court may exercise its discretion in passing upon the merits of the motion; otherwise the appellant has lost his right of appeal, and the consent of the parties cannot preserve it.

4. Same—Legislative Powers—Rules of Court—Constitutional Law.

The power of the Legislature to permit an extension of the time for settling the case on appeal, does not permit it to impinge upon the rule of the Supreme Court requiring the docketing thereof, within a prescribed time, or the issuance by the court of a *certiorari,* in its discretion.

5. Appeal and Error—Motion to Dismiss—Reinstatement—Res Judicata.

The refusal by the Supreme Court of appellant's motion for a *certiorari* is *res judicata* upon his later motion to reinstate the case upon the same grounds.

6. Same—Assignments of Error—Meritorious Case.

Upon a motion in the Supreme Court to reinstate a case that has been dismissed, it is required that the appellant should have properly assigned his errors to the judgment to be brought up for review and show a meritorious case.

7. Appeal and Error—Rules of Court—Conditions Precedent.

An appellant's right of appeal to the Supreme Court is dependent upon his observance of the rules regulating appeals.

APPEAL by defendant from *Calvert, J.*, at October Term, 1922, of SURRY.

The defendant was convicted for house-breaking and larceny, and from the judgment imposed, appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

E. C. Bivens for defendant.

CLARK, C. J. This case was tried at the October Term, 1922, of Surry. The defendant was allowed by the judge 60 days in which to serve case on appeal and the State 30 days thereafter to serve counter case. The case on appeal was not served within the 60 days, and there was no application for *certiorari* filed until 27 March, 1923, which on 3 April, 1923, was denied, and the motion of the Attorney-General to dismiss the appeal was allowed.

This was a motion to reinstate filed on 17 April, 1923, and is based upon the same ground as the motion for *certiorari*, to wit: That the official stenographer was "so busy that she could not furnish copy for the appellant of the evidence until after the 60 days had expired." The motion to reinstate is based upon the same ground.

It is true the statute permits the judge now to extend the time for settling cases on appeal. The court deprecates the unusual length of time allowed in some instances. The result is simply to delay the administration of justice, and, besides, makes it more difficult to settle cases on appeal by the lapse of time. It is true that where there is a stenographer, the notes of the evidence can be reduced to writing, but we have often held that these notes are not controlling, and that it is the judge's function and his responsibility, of which he cannot be dispossessed nor voluntarily abdicate, to determine what was the evidence. Though the stenographer's notes may be very useful to the judge, they are not controlling. If they were it would substitute the stenographer for the judge in one of his most essential functions. *Cressler v. Asheville*, 138 N. C., 485; *S. v. Shemwell*, 180 N. C., 718, and other cases in which we held: "Now, as always, these matters must be settled by the judge. When counsel disagree, the stenographer's notes will be valuable aid to refresh

the judge's memory, but the stenographer does not displace the judge in any of his functions." The motion for the *certiorari* in this case was therefore denied, and so must this motion to reinstate on the same ground that the "court stenographer was so crowded with work that it was impossible for her to get up the abstract of evidence within the time allowed the defendant for his service of the case, and the solicitor agreed to waive the time." In the capital case of *S. v. Harris,* 181 N. C., 613, there was similar ground presented and disallowed.

If in addition to the many grounds on which delay is asked in bringing up appeals to this Court, or negligence in so doing is sought to be condoned, there were to be added this excuse that the stenographer cannot get up the evidence, it will entirely destroy all reasonable diligence in the dispatch of appeals, both civil and criminal.

There is certainly no lack of competent stenographers in this State. Indeed, until very recently, justice was dispensed without seeking their aid at all, but if an alleged scarcity, or the overwhelming popularity of any stenographer is such that the amount of business devolving upon any one stenographer can excuse delay, there will be an end to all promptness in judicial proceedings. If a stenographer is so much in demand that he must go from court to court, and from case to case, before finishing the work in hand, it cannot be taken as an excuse. It is his duty to do the work with which he is entrusted before taking employment in another case or at another court. This might as well be understood once and for all.

There are enough stenographers "to go round," and until one is able to discharge promptly the duties he has taken, it is the duty of litigants and defendants to get other stenographers who can readily be had.

Besides, we have often held, and ought not to be called on to repeat, that when for any really excusable ground a "case on appeal" is not made up in time, the appeal should be docketed nevertheless at the regular time and an application made for *certiorari.* It is out of the power of the judge or solicitor to dispense with the rule of this Court requiring such docketing at the time prescribed by the rules of this Court. While the Legislature can extend the time for settling a case on appeal, it cannot impinge upon the rules of this Court, *Herndon v. Ins. Co.,* 111 N. C., 384, specifying the time in which an appeal must be docketed, unless the Court shall see fit to grant a *certiorari,* which is a matter within its discretion.

In *Mimms v. R. R.,* 183 N. C., 436, it was held, *Stacy, J.,* "Where a case on appeal has not been docketed by appellant within the time required by the rule of practice in the Supreme Court regulating it, and a motion has not been duly made for *certiorari,* it will be dismissed. It is discretionary with the Court as to whether this motion for writ will be allowed, which the consent of the parties cannot affect." There are

many precedents in which this has been held. Even, therefore, if there had been demand for the services of this particular stenographer for other cases, and at other courts, so that the defendant could not make up his appeal in time, application should have been made for *certiorari*, and then the Court in its discretion would have granted or not granted the *certiorari*. Neither the solicitor nor opposing counsel could waive this rule of the Court.

The petition for *certiorari* was not filed here until 27 March of this term, and was properly denied, and is *res judicata*.

The application for the *certiorari* was properly denied, and the motion for dismissal was further properly allowed upon the ground that there was no assignment of error in the judgment sought to be brought up for review, nor did it disclose meritorious ground. *Short v. Sparrow*, 96 N. C., 348; *In re Britain*, 93 N. C., 587; *Lewis v. Foard*, 112 N. C., 402; *March v. Thomas*, 63 N. C., 249.

To sum up, we wish to call the attention of the profession to the fact that now, as in the days of *Magna Carta*, it is the right of the parties and the duty of the court that justice shall be administered without delay. To that end the rules of the Court and the requirements of the statute must be observed, and neither can be dispensed with by the consent of counsel or of the parties.

While deprecating the excessive extent to which time is now allowed in some cases for making up appeals, we again call attention, as we have often done, to the fact that this does not impair the power of the Court, by its rules, to prescribe the time within which appeals can be docketed here, and that when this is not done, parties who have any sufficient ground to ask this Court for *certiorari* must do so within the time prescribed by the rules of the Court, and then, as held in cases above cited, whether the court will allow the *certiorari* is a matter within the discretion of the Court.

As we have often said, an appeal is not a matter of absolute right, but conditioned upon the observance of the requirements for presenting the appeal in this Court. Therefore, the defendant, as a ground for *certiorari*, in addition to the other requirements, must allege error and assign meritorious grounds for the appeal, besides filing appeal bond, printing the records and briefs (except in pauper appeals) and otherwise complying with the ordinary requirements of the Court and the statutes.

An observance of these matters is essential that the time of the Court may be applied to the consideration of matters of substance sought to be reviewed, and not be taken up in considering excuses for delay, and for failure of parties or counsel by negligence or otherwise, to comply with the necessary prerequisites for the consideration of appeals.

Motion to reinstate denied.

STATE v. J. E. JESTES.

(Filed 16 May, 1923.)

1. Appeal and Error—Evidence—Subsequent Admission.

The admission of evidence upon the trial that had formerly been excluded does not constitute reversible error for its prior exclusion.

2. Appeal and Error—Evidence—Questions and Answers—Record.

The expected answers to questions excepted to must appear of record on appeal, in order that the court may pass upon the question of error in the exclusion of the questions.

3. Appeal and Error—Objections and Exceptions—Instructions—Contentions—Waiver—Record.

Exception to the judge's statement to the jury of appellant's contentions will not be considered on appeal when for the first time noted in his assignments of error, for then they are deemed as waived by him.

4. Criminal Laws—Bills and Notes—Alteration—Forgery—Instructions—Presumptions—Evidence—Rebuttal.

Where there is evidence that the one in whose possession a promissory note had been given, forged the payee's name thereon and had it discounted at the bank, and used the money thus obtained, an instruction that if the jury so found the facts beyond a reasonable doubt, it would raise a presumption of the defendant's guilt in forging the name of the endorser and altering the note, which the defendant was required to rebut, is not erroneous. *S. v. Patterson*, 129 N. C., 556, cited and applied.

APPEAL by defendant from *McElroy, J.*, at Fall Term, 1922, of AVERY.

The following is a brief statement of the material facts: The defendant sold a tract of land to his brother, J. W. Jestes, for $1,200, and bought a tract from W. H. Byrd for $2,000. Defendant was to pay Byrd $1,000 cash, and was to secure the balance by a deed of trust on the land. The defendant testified he paid this $1,000 as follows: $100 in cash to bind the trade, $600 received from his brother, and a note for $300 dated 27 February, 1920, signed by his brother, J. W. Jestes, Charlie Coffey, and J. L. Fox, and made payable to W. H. Byrd six months after date. The $600 payment and the note were a part of the $1,200 due the defendant by J. W. Jestes. The defendant contended that the note for $300 was sent by J. W. Jestes to W. H. Byrd without coming into the possession of the defendant. The State contended J. W. Jestes gave the note to the defendant for delivery to Byrd, and that instead of delivering the note as directed, the defendant endorsed Byrd's name on the note and signed his own name under Byrd's and had the note discounted at the Bank of Banner Elk without Byrd's knowledge or consent.

The indictment contains two counts. The first charges the defendant with forging the name of Byrd as endorser, and the second with unlawfully altering the note. The defendant was convicted on both counts. Judgment was pronounced, and he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

G. A. Love and Harrison Baird for defendant.

ADAMS, J. A close investigation convinces us that there is no error in the record. The first five exceptions relate to the exclusion of evidence, but neither exception can be sustained. In several instances the excluded evidence was afterwards admitted, and in the others it does not definitely appear what the answers would have been. *Dickerson v. Dail*, 159 N. C., 541; *In re Edens*, 182 N. C., 398; *Snyder v. Asheboro, ibid.*, 708.

The evidence for the State tended to show that the defendant had altered not only the note in question, but other papers as well, and to his Honor's statement of the contentions in regard to these changes the defendant excepted. He did not object at the time, but afterwards incorporated the objection in his statement of case on appeal as one of the "errors assigned and to be assigned," and thereby waived the exception. *S. v. Little*, 174 N. C., 800; *S. v. Merrick*, 172 N. C., 870; *S. v. Johnson, ibid.*, 920; *S. v. Foster, ibid.*, 960.

Exception was taken to the following paragraph in his Honor's charge: "If you are satisfied beyond a reasonable doubt that the endorsement of W. H. Byrd on the $300 note was a forgery, and that the defendant had it in his possession and obtained money from the Bank of Banner Elk on it, then this raises a presumption of the guilt of the defendant, and unless he has rebutted it, you will return a verdict of guilty."

The exception must be overruled. The instruction is almost of a literal quotation from the decision in *S. v. Peterson*, 129 N. C., 556, and is supported by *S. v. Britt*, 14 N. C., 122; *S. v. Morgan*, 19 N. C., 348; *S. v. Lane*, 80 N. C., 407.

No error.

STATE v. ROBERT GOODE.

(Filed 16 May, 1923.)

Criminal Law—Assault—Secret Assault—Evidence—Appeal and Error—Prejudicial Error—New Trials.

Upon the trial for a secret and felonious assault, there was testimony by the prosecutor that while he was plowing his field he had been struck by several spent No. 4 shot, evidently fired from a clump of pines, from which powder smoke issued, whereupon he went to his house and returned with his gun; and for the defendant, a lad, that he had attempted to shoot a dog about at this location, supposing it to be mad, according to instructions theretofore given him by his father, which was strongly corroborated and not contradicted, and did not know he had accidentally shot the prosecutor until he saw him returning with his gun, and was then afraid to tell him of his attempt to shoot the dog, and in consequence of this fear he had left home for several days, when he returned and gave himself up to the officer of the law. There was little or no motive shown for the shooting: *Held*, the testimony of the prosecutor that the boy's father had offered him money not to prosecute his son was reversible error, there being no suggestion that it was made in the presence of the son or with his knowledge; and further *held*, the whole evidence was scarcely sufficient for conviction.

APPEAL by defendant from *Bryson, J.*, at the Fall Term, 1922, of RUTHERFORD.

Indictment for secret and felonious assault on one Joseph Johnson, and with intent to kill. There was verdict of guilty, judgment, and defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

O. M. Mull, Clyde R. Hoey, and Quinn, Hamrick & Harris for defendant.

HOKE, J. On the trial, J. L. Johnson, the prosecutor, testified in effect as follows: "I live near High Shoals Church in this county, and have since 1 May. On the 4th day of last April I was living a near neighbor to Robert Goode; and was plowing up an old clay road out by my house to the main road and about 9 o'clock Robert Goode came to me and asked if I needed any work done, and I said not then, but that I would have some that evening, and I told him his father had forbid me paying him any more change, and that I could not work him any more unless they fixed that; he owed me a sack of cottonseed meal, and he spoke of working and paying it. I was plowing in this old road that leads up to the main road, and Robert Goode was living with his father. I was going to put the road in corn. About 9 o'clock Robert came to ask to work

for me, and he left me in a short time and went towards home, and said he would be back at one o'clock, and about 11 o'clock there was a gun fired and I felt a shot hit me on the neck, and I looked below in some little pine bushes and smoke was boiling up all around the pine bushes.

"I looked for something like a minute and dropped the mule traces loose and went to the house and came back. When I came back to where I was at work I saw Robert going towards home with a shotgun in his right hand. When the shot was fired I was plowing in the road that led to my house from the public road. I was 58 steps from the bushes where the gun fired. The shot that struck me was No. 4. I think I hollered when the shot hit me. Mr. Causby came along after that, but no one came when the shot was first fired.

"When I later saw Robert Goode he was one-quarter mile from where the shot was fired, and that was after I had been to the house and come back several minutes; I was within 200 yards of the house. Where I was standing when the shot was fired was 3 to 4 feet higher than the bushes from which the shot was fired. The cornstalk land was below me and between me and the bushes. I heard the shot rattle in the cornstalks and went and looked and the shot holes had went through the stalks. I was plowing across and there was a gulley or ditch line; not much difference from there to the end and where I was shot. When I got to the end of the row I did not see any sign of a man around the bushes; my first notice was when I felt a shot. A little later on I was at the store and Robert Goode and his father went on up the road in a buggy; I took out a warrant for him. I did not know of Robert having anything against me, and I had never had any trouble with him up until this, and had not had any trouble with the boy on that day, and he had been working for me some that spring. Two of the shot grazed the skin in my neck and I brushed them off with my hand. I went straight to the house, not having seen who fired the shot from the two little pine bushes. I was on higher ground than those bushes. I brought my gun back from the house, and then it was I saw Robert running. I was not excited. I had not seen any dog, and I knew the shots had hit me. Robert said at the recorder's trial that he had shot at the dog, and told me so later."

Defendant testified as follows: "I am the defendant in this case. The morning all this happened, when I got up, the dog had been there and I aimed to kill it, and father told me to kill it that morning. And I had sore eyes and was not able to work, and he said just to stay home and kill that dog, and I got out there after breakfast and hunted for it, and it was gone, and I went to Johnson's to see him about some work, and as I was going back down I found the dog laying there, and I went up to it to tie it until I could kill it, and the dog lay there and looked

like a mad dog going to have a fit; I had told mama I was not sure about killing it; that I was afraid Mr. Gray's folks would not like it, and she said to go on and kill it, to get Mr. Merchant's gun. I went to Merchant's house to get the gun and went back to where I had left the dog and when I got to within a short distance of where I had left it the dog got up and lit out through the bushes, and as it went through the bushes I just had one shell and I thought it would get away and I shot. When I fired I did not see Johnson, and I had no purpose to hit him. I was in the woods when I fired, and the dog came back by me and went off down the creek. I had talked with Johnson that morning in the field.

"We had not had any trouble; I thought a heap of him and had no malice and no desire to injure him. After I fired the shot I did not go to him because I was afraid he would be mad at me; I did not want any trouble; as I was going back home I saw him coming with his gun. Johnson went and got his gun and I went home, and then I went off because I was afraid of Mr. Johnson, but pretty soon I came back of my own accord and gave up to the officer. I did not know Johnson was plowing up the road. He was near his house when I saw him that morning.

"The dog looked like it was mad. If my father was angry about the road I did not know of it. He had not said a word about plowing up the road. I was down on the creek when I found the dog, and it was about 11 o'clock when I fired the shot. I borrowed the gun to kill the dog. I was on kinder top of the hill and Johnson was in the flat from the place he showed my father he was standing. I do not remember any bushes except the pines. I stated Johnson is my friend, and I did not intend to shoot him. I would have went up to Johnson's but I was afraid he would be mad. I went on to a neighbors and told him I shot and heard Johnson holler, and I was afraid in shooting at the dog I had hit him. I was aiming to go to him but saw him with the gun, and was afraid. I never had any trouble with Johnson about anything. I never threatened to shoot Johnson, but I did aim to hit dog. I thought that the dog was mad from the way he acted when I found him."

C. L. Green testified for defendant: "I had a conversation with Robert Goode about 12 o'clock at our store. I was talking about Johnson being shot and was phoning for the bloodhounds to come and trace up the fellow, and he stated that it might have been him but he would not call Johnson out and ask him because he was afraid he would be mad and make trouble. Johnson was not present, but was at the store phoning for the sheriff to bring the bloodhounds. I saw Robert three or four days after that at Mr. Bartee's."

Street Lovelace testified: "The day the dog was shot I was working on the land between Mr. Merchant's and Mr. Goode's. Before the shoot-

ing Robert came along the road with the gun and I said you ain't going to borrow a gun to go out hunting, and he said that dog Grays had left looked like it was mad, and that his mama wanted him to kill it, and I replied that if the dog looked like it was mad to kill it whether the Grays like it or not. That was a little bit before eleven o'clock; he was going back home from Merchant's with the gun on his shoulder, and it was before the shooting took place."

Cross-examination: "I was plowing and did not see the dog."

Redirect examination: "I did not see the dog that day, but did a little later when Robert came in to give up. The dog had been shot in the shoulder and I saw holes where the shot went and dry scabs. I do not know who shot the dog, but the holes and the scars were there."

Claud Bostic testified: "I saw this dog after the shooting a few days and found places on his back where shot went in."

J. Andy Goode, father of the defendant, testified: "I am the father of Robert Goode. On the day of the shooting I told Robert to get a gun and kill the dog. His eyes were sore, and the dog had been eating up eggs, and I told Robert to kill it. When I got to the edge of the field beyond Johnson's I heard a gun fire and seen smoke rise, and when I got in view of his place I heard a gun fire and heard a dog holler.

"After dinner I took the gun home to Mr. Merchant's, Robert and I, and at the cross-roads Johnson was on the porch. Johnson and I were talking about some cottonseed meal that he owed me. He told me about the shooting, and I told him that Robert went over there to shoot a dog, and if he was shot it might be by accident, as I heard the gun fire the dog holler over in the woods or in the underbrush. He did not accuse Robert of shooting him. Later on Johnson showed me the place where he was standing. I have nothing against Johnson. We agreed that we would change the road and talked it over friendly."

Cross-examination: "That dog was worthless and I wanted to get rid of him. Bob had sore eyes and stayed at home. Bob had been swapping work with Mr. Johnson and I then went on about my work and was one-quarter mile away when I heard a dog holler. I did not hear Johnson holler and had no idea he was hurt. When Robert came to dinner he told me he was afraid he had shot Johnson. My boy went off for several days on account of the fact that he said Johnson was high-tempered and he said he was afraid of him."

In rebuttal, prosecutor, recalled, testified over defendant's objection that Andy Goode, father of the boy, had offered prosecutor $75 to make it up. Defendant excepted. Ruling of court in admitting this testimony being in terms as follows: "In so far as admissions of defendant is concerned incompetent; competent as affecting Johnson." There was

also evidence that both the prosecutor and defendant were persons of good character.

On this, a sufficient statement of the facts presented, we are of opinion that this evidence of the prosecutor as to the offer of adjustment by the father of defendant was erroneously admitted. On examination as a witness, the father had not been asked as to the circumstance, and so far as appears the offer was not made in the presence of defendant, nor with his knowledge or consent, nor did it tend in any legal way to corroborate the statements of the prosecutor. In our view the only possible effect of the evidence was to throw into the jury box a permissible inference that the father may have thought his son was guilty of the charge, and so interpreted its reception is not sanctioned by any recognized principle of law applicable to trials of this kind.

In *S. v. Lunsford,* 177 N. C., 117, to which we were cited by counsel for the State, there was pertinent evidence tending to show that the defendant himself had been cognizant of and a party to the offer of adjustment, but not so here, and the reception of the evidence as stated must be held for error.

On further and careful consideration of the record we deem it proper to say that as now advised and on the facts as now presented we see very little if any evidence that would justify or uphold a conviction for a felonious secret assault with intent to kill. A perusal of the evidence showing that both the prosecutor and defendant were of good character, and there had been no previous animosity or quarrel between them. That the occurrence was at least two hours after defendant had been with prosecutor in his field. That prosecutor was evidently struck by spent or deflected shot, as they did not penetrate, and were number fours fired at a distance within 180 feet. That before defendant was accused, and on hearing of the charge, he said to disinterested parties that he might have done it, as he had shot at a dog down there near Johnson's field, and his statement is confirmed by the proof that the dog in question had been shot as claimed. The single circumstance in the entire testimony that tends to inculpate is the fact that after the occurrence defendant ran away for a few days, and his explanation of that is not at all unnatural or forced; that knowing Johnson to be a high-tempered, irascible man, he was apprehensive of personal violence from him, and went away for a day or two until his anger should have time to cool down.

For the error indicated, we are of opinion that defendant is entitled to a new trial of the cause, and it is so ordered.

New trial.

STATE v. ENOCH POTTER.

(Filed 16 May, 1923.)

1. **Intoxicating Liquor—Spirituous Liquor—Evidence—Statutes—Prima Facie Case—Nonsuit—Trials.**

Evidence that large quantities of whiskey were found concealed in the defendant's dwelling and on his premises, that a pathway led from the defendant's house to several stills having the appearance of their recent operation, constitutes prima facie evidence that it was in violation of C. S., 3379, and defendant's motion to dismiss as in case of nonsuit is properly disallowed.

2. **Verdict — Surplusage—Intoxicating Liquor—Spirituous Liquor—Ambiguity—Statute.**

Where the evidence of possession of whiskey by defendant is prima facie sufficient to show his unlawful purpose of sale, a verdict of "guilty of having too much liquor in his possession for the purpose of sale" is not objectionable as not responsive to the issue; or ambiguous admitting of explanation by reference to the evidence and the charge, the words "too much" being regarded as surplusage.

APPEAL by defendant from *McElroy, J.*, at Fall Term, 1922, of WATAUGA.

The defendant was convicted of a violation of the prohibition law, and he appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Lowe & Love for defendant.

ADAMS, J. The State's evidence tended to show these circumstances: In May, 1920, the officers searched the defendant's premises and found whiskey in an old house a short distance from his dwelling. In the "loft" they found one gallon in a jug and concealed in the ground a barrel containing twenty gallons. The barrel was covered with boards and the boards with trash. About 500 yards from the defendant's house were two still sites, at one of which a still had recently been operated. At each of these sites the officers found "spent beer," and in the defendant's house they found a fermenter which had been used within the three or four months next preceding. There was a path between the dwelling and the old house and another between the old house and one of the still sites. There was other evidence for the State, and evidence for the defendant in rebuttal.

The defendant first excepted to the court's refusal to dismiss the action as in case of nonsuit, but according to repeated decisions the

exception is clearly untenable. *S. v. Carlson,* 171 N. C., 818; *S. v. Jenkins,* 182 N. C., 818; *S. v. Clark,* 183 N. C., 733.

The statute makes it unlawful for any person to have or keep in his possession any spirituous liquors for the purpose of sale, and provides that the possession of more than one gallon at any one time shall constitute prima facie evidence of a violation of the statute. C. S., 3379. The jury returned for their verdict, "Guilty of having too much liquor in his possession for the purpose of sale." The defendant excepted on the ground that the verdict is not responsive to the issue, but this position cannot be sustained. The verdict is not insufficient as in *S. v. Parker,* 152 N. C., 790; *S. v. Whitaker,* 89 N. C., 472, and *S. v. Hudson,* 74 N. C., 246; nor ambiguous, admitting of explanation by reference to the evidence and charge, as in *S. v. Gilchrist,* 113 N. C., 674; *S. v. Gregory,* 153 N. C., 646, and *S. v. Brame, ante,* 631; but it is to be construed as if the words "too much," which are surplusage, had been omitted. *S. v. McKay,* 150 N. C., 813; *S. v. Snipes, post,* 743.

We find no error in the record.

No error.

STATE v. C. L. SNIPES.

(Filed 16 May, 1923.)

1. Intoxicating Liquors—Spirituous Liquors—"Receive"—Statutes—Evidence.

Considering the language of C. S., 3385, with the history of legislation relating to prohibition, *it is held* that its controlling intent and purpose is to make it unlawful for any person to acquire and take into his possession within the State at any one time or in any one package, spirituous or vinous liquors, etc., in a quantity greater than one quart, without restricting the meaning of the word "receive" to "accepting from another"; and evidence tending to show that the defendant had walked straight to the place where the prohibited quantity was concealed and taken it from its hiding place, is sufficient to show that he knew it had been hidden there for his benefit, and sustain a conviction.

2. Verdicts—Responsiveness—Issues.

A verdict must be certain and responsive to the issues submitted by the court.

3. Same—Courts—Changes—Surplusage.

While the court may make a merely formal change in the verdict, it cannot amend or change a verdict in any matter of substance without the consent of the jury, or with their consent after the verdict has been finally recorded; but if a verdict is responsive to the issue or issues submitted, and is otherwise sufficient, words which are not a part of the legal verdict may be treated as surplusage.

4. Verdicts—Evidence—Presumptions.

Where an indictment contains several counts and the evidence applies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates.

5. Verdicts — Indictment—Several Counts—Issues—Answers—Presumptions.

Where the indictment contains several counts, and there is a verdict of guilty as to some but no verdict as to the others, the failure to return a verdict as to the latter is equivalent to a verdict of not guilty.

6. Verdicts—Ambiguity—Interpretation—Evidence—Instructions.

If a verdict as returned is not complete, but is ambiguous in its terms, the ambiguity may sometimes be explained and the verdict construed by reference to and in connection with the evidence and the charge of the court.

7. Intoxicating Liquors — Spirituous Liquors — Indictments — Counts—Statutes—Conviction—Constitutional Law.

Counts in an indictment charging the defendant with violating our prohibition law, first, having liquor in his possession for the purpose of sale; second, with receiving within the State a quantity greater than one quart; third, receiving within the State a package of spirituous liquor in a quantity greater than one quart, do not charge the offense prohibited by C. S., 3386, making it unlawful for any person during the space of fifteen consecutive days to receive such liquors in a quantity or quantities totaling more than one quart; and a verdict under the counts in this indictment of guilty of receiving more than one quart of whiskey in fifteen days is not responsive to the issues, and is a conviction of an offense of which the defendant was not tried, and concerning which a former conviction may not be successfully maintained, and is in contravention of Art. II, secs. 11 and 12, of our State Constitution.

8. Same—Appeal and Error—Objections and Exceptions—Briefs—Rules of Court.

Where the defendant, tried for violating our State prohibition law, has not been indicted under the provisions of C. S., 3386, for receiving within fifteen consecutive days in this State liquors in quantity or quantities totaling more than one quart, but the trial has been proceeded with under other counts, his exception to the court's refusal to set aside a verdict of conviction under C. S., 3386, and to the judgment accordingly entered, is sufficient to bring up the case to the Supreme Court for review; and his brief addressed to the insufficiency of the verdict, citing authorities, is a compliance with Supreme Court rules in that respect.

CLARK, C. J., dissenting.

APPEAL by defendant from *Finley, J.*, at February Term, 1923, of CALDWELL.

Criminal action for a violation of the prohibition law. The indictment contains three counts. In the first the defendant is charged with having liquor in his possession for the purpose of sale; in the second, with receiving at a point within the State at one time spirituous liquor

in a quantity greater than one quart; and in the third, with receiving at a point within the State in one package spirituous liquor in a quantity greater than one quart.

Will Beach, a witness for the State, testified that he, the defendant, and two other men were traveling in an automobile which broke down, and that he and the defendant went into the woods to get some blocks to put under the car in order to prize it up for repairs; that while they were in the woods the defendant raked off some leaves and took out of the ground a half-gallon fruit jar containing about three pints of whiskey; that when the sheriff came up, the witness had the whiskey in his possession; and that he had pleaded guilty to a breach of the statute at the November term. On cross-examination he testified that he was not certain who took the whiskey out of the ground, but on the redirect examination he said that the defendant walked straight to the whiskey and found it, and that his best impression was the defendant took it from the ground and delivered it to the witness.

The judge charged the jury if they were satisfied from the evidence beyond a reasonable doubt that the defendant unlawfully and willfully got more than a quart of whiskey at one time in one package and took it into his possession he would be guilty.

For their verdict the jury said: We find the defendant guilty of receiving more than one quart of whiskey in fifteen days. Judgment was pronounced, and the defendant appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Lawrence Wakefield for defendant.

ADAMS, J. It is necessary to consider the case with reference to the second and third counts only, for as to the first there was no instruction by the court, and presumably no consideration, and certainly no verdict by the jury.

The defendant first moved to dismiss the action on the ground that the evidence, if accepted, did not show that he had received any whiskey within the meaning of the statute—that finding a thing and taking it into one's possession is not synonymous with receiving it. We are therefore required to construe the statute (C. S., 3385), and in construing it to ascertain the object intended to be accomplished and to enforce the intention of the Legislature by applying the spirit or reason rather than the letter of the law. 36 Cyc., 1106. An examination of the phraseology of the statute and of the history of legislation relating to prohibition convinces us that the purpose of the law is to prevent any person from acquiring or taking into his possession within the State at

any one time or in any one package spirituous or vinous liquors or intoxicating bitters in a quantity greater than one quart, or malt liquors in a quantity greater than five gallons, and that in the accomplishment of this purpose the General Assembly did not intend to indulge in nice distinctions or to restrict the meaning of the word "receive" to the narrow compass of "accepting from another."

The evidence is easily susceptible of the interpretation that some other person had concealed the liquor for the benefit of the defendant, who no doubt with knowledge of the exact spot "walked straight to it" and took the vessel from the ground. When the defendant thus acquired or took the liquor into his possession he received it in the sense in which the word "receive" is used in the statute. *Knipe v. Austin,* 43 Pac., 25; *Baker v. Keiser,* 23 At. 735; *Early v. Friend,* 78 Am. Dec., 649; *West v. Weyer,* 15 A. S. R., 552.

The next question is more serious. When the verdict was returned the defendant moved to set it aside and excepted to the adverse ruling of the court; and when judgment was pronounced the defendant again excepted.

With respect to the verdict of a jury in a civil or criminal action, the following principles are generally recognized and applied:

1. A verdict must be certain and responsive to the issue or issues submitted by the court. Clark's Cr. Pro., 480 *et seq.*; Bishop's Cr. Pro., 867; 16 C. J., 1103; *S. v. Whitaker,* 89 N. C., 472; *S. v. Whisenant,* 149 N. C., 515; *S. v. Parker,* 152 N. C., 791; *S. v. Lemons,* 182 N. C., 828.

2. While a change merely as to form is not fatal, the court cannot amend or change a verdict in any matter of substance without the consent of the jury, and cannot do so with their consent after the verdict has been finally accepted and recorded; but if a verdict is responsive to the issue or issues submitted, and is otherwise sufficient, additional words which are not a part of the legal verdict may be treated as surplusage; as, for example, a verdict of guilty with a recommendation of mercy. Clark's Cr. Pro., *supra; S. v. Hudson,* 74 N. C., 246; *S. v. Whitaker, supra; S. v. Kinsauls,* 126 N. C., 1095; *S. v. Godwin,* 138 N. C., 583; *S. v. Whisenant, supra; S. v. McKay,* 150 N. C., 816; *S. v. Hancock,* 151 N. C., 699; *S. v. Parker,* 152 N. C., 790; *S. v. Murphy,* 157 N. C., 615.

3. Where the indictment contains several counts and the evidence applies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates. *Morehead v. Brown,* 51 N. C., 369; *S. v. Long,* 52 N. C., 26; *S. v. Leak,* 80 N. C., 404; *S. v. Thompson,* 95 N. C., 597; *S. v. Stroud, ibid.,* 627; *S. v. Cross,* 106 N. C., 650; *S. v. Toole, ibid.,* 736; *S. v. Gilchrist,* 113 N. C., 673; *S. v. May,* 132 N. C., 1021; *S. v. Gregory,* 153

N. C., 646; *S. v. Poythress,* 174 N. C., 813; *S. v. Strange,* 183 N. C., 775.

4. Where the indictment contains several counts, and there is a verdict of guilty as to some but no verdict as to the others, the failure to return a verdict as to the latter is equivalent to a verdict of not guilty. *S. v. Thompson, supra; S. v. Cross, supra.*

5. If a verdict as returned is not complete, but is ambiguous in its terms, the ambiguity may sometimes be explained and the verdict construed by reference to and in connection with the evidence and the charge of the court. *Greenleaf v. R. R.,* 91 N. C., 33; *S. v. Gilchrist,* 113 N. C., 676; *S. v. Gregory,* 153 N. C., 648; *Richardson v. Edwards,* 156 N. C., 590; *Donnell v. Greensboro,* 164 N. C., 331; *Bank v. Wilson,* 168 N. C., 557; *Reynolds v. Express Co.,* 172 N. C., 487; *Price v. R. R.,* 173 N. C., 397; *Grove v. Baker,* 174 N. C., 747; *Wilson v. Jones,* 176 N. C., 207; *Jones v. R. R.; ibid.,* 260; *Balcum v. Johnson,* 177 N. C., 218; *Howell v. Pate,* 181 N. C., 117.

The statutes upon which the second and third counts are based makes it unlawful for any person to receive at any one time or in any one package within the State any of the liquors described in a quantity greater than one quart. There is another statute (C. S., 3386) which makes it unlawful for any person during the space of fifteen consecutive days to receive such liquors in a quantity or quantities totaling more than one quart. The difference between the two statutes is readily observable. In a prosecution upon the first it must be shown that the liquor was received at one time or in one package; in a prosecution upon the second it must appear that during the space of fifteen consecutive days liquor was received in a quantity or quantities totaling more than one quart. And the verdict must respond to the charge. It will also be observed that the statute last referred to is not included in either count, and is not referred to in the indictment; but the jury, instead of considering the issues raised by the second and third counts and submitted in his Honor's charge disregarded the charge and the issues and convicted the defendant of receiving more than one quart of whiskey in fifteen days—a crime with which he was not charged, and concerning which his Honor gave the jury no instruction. The verdict is not responsive to the issue joined on either of the counts because there is no finding that the liquor was received at any one time or in any one package; and it cannot be amended or changed or construed by reference to the evidence and the charge because it is not ambiguous, but is clear and complete. It was accepted and recorded as it was returned, and it shows unequivocally that the jury did not convict the defendant of any offense with which he was charged or for which he was prosecuted. If the defendant should again be prosecuted on the second and third counts, his plea of

former conviction could not be upheld on the verdict as it now appears. It must be understood that the question is not whether the evidence is sufficient to sustain the counts in the bill or to show the receipt of more than one quart of liquor in fifteen consecutive days; the paramount question is whether a man who is prosecuted for one crime can lawfully be convicted of another. There can be only one answer. To punish him for a crime of which he is not convicted would be to run broadside against the Constitution, and, in effect, to abrogate the law laid down in a large number of decisions. The Constitution provides that in all criminal prosecutions every man has the right to be informed of the accusation against him, and that no person shall be put to answer any criminal charge, . . . but by indictment, presentment, or impeachment. Art. I, secs. 11, 12. "These principles," said *Chief Justice Nash*, "are dear to every free man; they are his shield and buckler against wrong and oppression, and lie at the foundation of civil liberty; they are declared to be the rights of the citizens of North Carolina and ought to be vigilantly guarded." *S. v. Moss*, 47 N. C., 67. And it is hardly conceivable that *Chief Justice Ruffin*, by commending a statute which merely simplified the form of indictments, intended to disregard this fundamental doctrine and to "drive a coach and six" through the organic law. *S. v. Simons*, 68 N. C., 378; *S. v. Ray*, 92 N. C., 810; *S. v. Lewis*, 93 N. C., 581; *S. v. Cline*, 150 N. C., 854; *S. v. Whedbee*, 152 N. C., 770; *S. v. Wilkerson*, 164 N. C., 432.

It is suggested, however, that a defect in the verdict was not presented on the oral argument, and does not appear in the brief, and that exceptions in the record not set out in the appellant's brief will be treated as abandoned. But, as we have stated, the record discloses the defendant's exception to the verdict, his exception to the court's refusal to set aside the verdict, and his exception to the judgment. As to the verdict and judgment, what other exception could have fortified his position? And in his brief the third exception, with an array of authorities, is addressed entirely to the insufficiency of the verdict.

A casual comparison with the instant case of *S. v. Brame*, *ante*, 631, will reveal the distinction between the verdicts rendered in the two cases; and certainly the appellant's misinformation or misconception of the verdict in *Brame's case*, *supra*, could by no means modify its legal significance. There the jury found the defendant guilty of a breach of the statute upon which he was prosecuted, and the ambiguity in the verdict was explained by reference to the record or the charge, and the evidence in conformity with the principle hereinbefore stated; and in the case at bar the verdict is complete, but is not responsive to the bill of indictment.

The verdict returned in this case, and the form of other verdicts recently reviewed on appeal, impel us to direct attention to what the

Court has said in *S. v. Godwin,* 138 N. C., 585: "Before a verdict returned into open court by a jury is complete, it must be accepted by the court for record. It is the duty of the judge to look after the form and substance of a verdict so as to prevent a doubtful or insufficient finding from passing into the records of the court. For that purpose the court can, at any time while the jury are before it or under its control, see that the jury amend their verdict in form so as to meet the requirements of the law. When a jury returns an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted, they may be directed by the court to retire and reconsider the matter and bring in a proper verdict, *i. e.,* one in proper form. But it is especially incumbent upon the judge not even to suggest the alteration of a verdict in substance, and in such matters he should act with great caution."

We are sure that the form of the verdict returned in the present case, in an inadvertent moment, no doubt, escaped the attention of the vigilant and painstaking judge who presided at the trial.

The judgment and verdict are set aside to the end that the issues joined between the State and the defendant may be determined by another jury.

New trial.

CLARK, C. J., dissenting: The majority opinion concedes that the facts recited in the evidence justified the "interpretation that the liquor had been concealed for the benefit of the defendant, who no doubt with knowledge of the exact spot walked straight to it and took the vessel from the ground," and holds that "when the defendant thus acquired or took the liquor into his possession, he 'received it' in the sense in which that word is used in the statute," citing authorities.

Mr. Lawrence Wakefield, the learned counsel for the defendant, in opening his argument, stated that he had intended to make an objection that the verdict was defective, but said that after examining the decision at this term in *S. v. Brame, ante,* 631, he found that he was cut off from that defense, and he did not argue it or present it, but based his case entirely upon the ground that the word "receive" did not embrace this case where the whiskey was not received from a third person directly, but was taken out of the ground. This was the only argument he made, and on that point, which the court has held against him, he contended there "was no evidence to support the verdict."

The proposition as to a defect in the verdict on which the court bases its opinion was not presented in the argument of counsel, nor does it appear in his brief. Nor was such exception taken at the trial. Rule 31 of this Court, 174 N. C., at p. 834, provides that "no exception not set out or filed and made a part of the case and record shall be considered

by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action or motions in arrest for insufficiency of indictment." There is no such exception nor such motion.

Further, if there had been such exception in the record, Rule 34, 174 N. C., at p. 837, provides: "Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited will be taken as abandoned by him." On both these grounds the new trial should be refused. The rule and the practice are explicit. Furthermore, even if there had been such exception in the record, and this had been set out in plaintiff's brief with authorities cited, and had been so argued, it should have been disregarded. In *S. v. Hedgecock, ante*, 714, in a unanimous opinion, it is said: "*Chief Justice Ruffin*, in *S. v. Moses*, 13 N. C., at p. 463, as far back as 1830, in reference to the act of 1811, ch. 809 (now C. S., 4623), said that it was 'enacted that in all criminal prosecutions in the Superior Courts it shall be sufficient that the indictment contain the charge in a plain, intelligible, and explicit manner; and no judgment shall be arrested for or by reason of any informality or refinement, when there appears to be sufficient in the face of the indictment to induce the court to proceed to judgment.' And he added these memorable words, which express the best judicial thought of his day, and which since has obtained everywhere: 'This law was certainly designed to uphold the execution of public justice, by freeing the courts from those fetters of form, technicality, and refinement which do not concern the substance of the charge, and the proof to support it. Many of the sages of the law had before called nice objections of this sort a disease of the law and a reproach to the bench, and lamented that they were bound down to strict and precise precedents, neither more brief, plain, nor perspicuous than that which they were constrained to reject. In all indictments, especially in those for felonies, exceptions extremely refined, and often going to form only, have been, though reluctantly, entertained. We think the Legislature meant to disallow the whole of them, and only require the substance, that is, a direct averment of those facts and circumstances which constitute the crime, to be set forth.' "

But if, notwithstanding the requirements in Rules 31 and 34, and the provisions of C. S., 4623, and the decision of *S. v. Brame, supra*, and that there is nothing to contradict the evidence which the opinion in chief holds constituted a "receiving" of one quart of whiskey by the defendant, we must consider the alleged defect in the verdict, it cannot be sustained.

The second count in the indictment charged the defendant with "receiving at a point within the State at one time spirituous liquor in a quantity greater than one quart"; and in the third with "receiving at a

point within the State, in one package, spirituous liquor in a quantity greater than one quart." The evidence fully sustained the charge that the defendant did receive spirituous liquor in a quantity greater than one quart, and also with receiving it in one package in a quantity greater than one quart. The verdict "We find the defendant guilty of receiving more than one quart of whiskey in 15 days" is certainly justified by the evidence, and in strict compliance with both of these counts in the indictment, for the defendant did receive it in a quantity greater than one quart, and he did receive it in one package. C. S., 3385, provides, in the very terms of this indictment, that it was "unlawful for the defendant to receive at one time, or in one package, within the State, spirituous liquor in a quantity greater than one quart." That was what section 3385 forbade, and which the defendant did not contradict by evidence in any respect. It is true the words "in 15 days" were superadded, but as the evidence showed, it was "received at one time and in a quantity greater than a quart." The addition of the words "within 15 days" are simply surplusage and nothing more. *Utili non per inutile vitiatur.*

If the defendant had received it in smaller quantities, but so that the aggregate amount would be more than one quart within 15 days, he would have been guilty, but that was not charged, and the evidence proved that he did receive the whiskey in a quantity greater than one quart, and in one package. Therefore, the finding that the defendant received more than a quart in 15 days was not a matter of which the defendant could complain. According to the evidence, he got the quart as he was charged with doing, and at one time, and the finding that he got the quart within the State within 15 days could in no wise affect the verdict to his detriment.

In *S. v. Brame, ante,* 631, the jury returned the verdict that the defendant was "guilty of receiving more liquor than allowed by law," and *Stacy, J.,* speaking for a unanimous Court, held that "viewing the trial in its entirety, as disclosed by the record, we think it is clear that the verdict rendered amounts to a conviction of the defendant of having violated C. S., 3385: 'It is unlawful for any person, firm, or corporation, at any one time or in any one package, to receive at a point within the State of North Carolina for his own use, or for the use of any firm, person, or corporation, or for any other purpose whatever, any spirituous or vinous liquors or intoxicating bitters in a quantity greater than a quart, or any malt liquors in a quantity greater than 5 gallons.' " That case covers this as a glove covers a hand. How could it prejudice the defendant to find that he did the unlawful act in 15 days, when the uncontradicted evidence is that he did it in one day, at one time, and the court has held that the manner in which he acquired that quart was a "receiving" in law. If done in one day, it was done "within 15 days."

It is said in *S. v. Brame, supra,* that the "chief purpose and primary object (of this section 3385) was to prohibit the receipt by any person, firm, or corporation, at any one time or in any one package, of any spirituous or vinous liquors in a quantity greater than one quart or any malt liquors in a quantity greater than 5 gallons." That is what the evidence in this case, which the defendant did not contradict, clearly proved, and it is within the scope and purpose of C. S., 3385, and within the terms of the indictment.

STATE v. W. T. ESTES.

(Filed 26 May, 1923.)

1. Obstructing Justice — Criminal Law — Officers—Health—Sanitary Inspectors—Statutes.

Sanitary inspectors appointed by the State Board of Health, by virtue of the statute, are authorized and empowered to enter upon any premises and into any buildings or institutions for the purposes of inspection as provided by law or by regulations of the State Board of Health, pursuant to law, and one who willfully interferes with or obstructs them in the performance of their duties is guilty of a misdemeanor and subject to a fine of not less than $100 nor more than $1,000, or imprisoned at the discretion of the court. C. S., 7139, 7140.

2. Same—Instructions—Directing Verdict—Questions for Jury.

In an indictment against one who is charged with willfully obstructing a sanitary inspector of the State Board of Health in the discharge of his duties, the trial judge may not direct a verdict, and it is only when uncontradicted evidence, if accepted as true, establishes the defendant's guilt that he may properly instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. C. S., 7139, 7140.

3. Same—Threats—Intimation.

Mere words or opprobrious language with an expression of an intention to resist are not sufficient to sustain an indictment for willfully interfering with or obstructing an officer of the law in the performance of his duties, C. S., 7140, unless spoken under circumstances which are calculated to deter an officer of ordinary courage and reasonable prudence in the discharge of his duty pertaining to his office, which raises an issue of fact for the jury to determine.

APPEAL by defendant from *Ray, J.*, at November Term, 1922, of CALDWELL.

In the indictment it was charged that the defendant unlawfully and willfully did resist, hinder, delay, obstruct, and interfere with W. S.

Chapel, an officer of the North Carolina State Board of Health, in the discharge of his duty as such officer.

Chapel testified that he was a sanitary inspector, employed by the State Board of Health; that on 2 October, 1922, he went to the defendant's store in Granite Falls, shook hands with him, and said, "I find you have not complied with the law with regard to your toilet"; that the defendant cursed him, and replied, "I don't want you to follow me another inch"; that the witness rejoined, "It is the law, and we have but two courses to pursue, one to persuade you and another not so pleasant"; that defendant again cursed him, and the witness asked whether the defendant meant to obstruct him as a public officer, and the defendant said that was exactly what he meant; that the witness then started out, and the defendant used obscene language. The witness further testified: "I went on out. Later he (defendant) asked me to take up the warrant, and I told him he had treated me dirty that afternoon, and I had taken up a warrant last year. Defendant at no time rose from his desk, and did not strike or offer to strike me. He made no demonstration of violence whatever. The conversation occurred in the store. The toilets that we were talking about were located at his house and on another lot."

There was no other evidence. Defendant's motion for judgment of nonsuit was denied. Thereupon the court charged the jury as to the presumption of innocence of the defendant, and that the burden was on the State to prove his guilt beyond a reasonable doubt. If there was no reasonable doubt as to the truth of the evidence, to convict the defendant, and if there was any doubt about it, to acquit. The defendant excepted to the charge. There was a verdict of guilty, on which judgment was pronounced. The defendant excepted and appealed.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Mark Squires for defendant.

ADAMS, J. C. S., 7139, provides that for the faithful execution of various laws relating to the public health (ch. 118, art. 8), the State Board of Health shall organize and maintain a bureau of sanitary engineering and inspection, which shall be charged with the performance of specified duties; and by virtue of section 7140 the sanitary inspectors appointed to assist in the enforcement of the article referred to are authorized and empowered to enter upon any premises and into any buildings or institution for purposes of inspection, as provided by law, or by regulations of the State Board of Health pursuant to law. W. S. Chapel was a sanitary inspector, and on 2 October, 1922, he went to the defendant's place of business ostensibly for the purpose of enforcing

certain statutory requirements in regard to the public health, and at the meeting on that occasion of the witness and the defendant the circumstances related in the evidence took place.

His Honor instructed the jury to convict the defendant if they had no reasonable doubt as to the truth of the evidence; and the appeal presents the question whether the evidence, if true, necessarily establishes the defendant's guilt. The statute is as follows: "Any person or persons who willfully interfere with or obstruct the officers of the State Board of Health in the discharge of any of the aforementioned duties shall be guilty of a misdemeanor and subject to a fine of not less than one hundred dollars nor more than one thousand dollars, or imprisoned at the discretion of the court."

It is a recognized principle that the trial judge is not justified in directing a verdict of guilty in a criminal action—a concrete application of the principle appearing in *Dixon's case*, 75 N. C., 275, in which the presiding judge said, "I shall tell the jury to return a verdict of manslaughter." *S. v. Dixon*, 75 N. C., 275; *S. v. Boyd*, 175 N. C., 791; *S. v. Singleton*, 183 N. C., 738. But where, as an inference of law the uncontradicted evidence, if accepted as true, establishes the defendant's guilt it is permissible for the court to instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. *S. v. Vines*, 93 N. C., 493; *S. v. Winchester*, 113 N. C., 642; *S. v. Riley, ibid.*, 648; *S. v. Woolard*, 119 N. C., 779. In the instant case his Honor no doubt had this principle in mind, and the soundness of the instruction is dependent on the ultimate question whether the mere use of words unattended by any force or demonstration of violence shall be held as a matter of law necessarily to constitute an obstruction of or interference with the sanitary inspector while engaged in the discharge of his legal duties. We confine our discussion to this proposition because it is specially worthy of note that, although the defendant said he meant to obstruct the officer, the witness did not testify that he was in any respect either obstructed, interfered with, intimidated, or deterred from accomplishing the purpose of his visit to the store.

In this jurisdiction it is held that language *per se* is not a sufficient provocation to justify an assault, and that some demonstration of force is necessary; but when one person addresses language to another which is calculated and intended to provoke, and does provoke, an assault, both parties are guilty. In *S. v. Hill*, 20 N. C., 629, *Judge Gaston* said: "The general rule of law is that words of reproach or contemptuous gestures, or the like offenses against decorum, are not a sufficient provocation to free the party killing from the guilt of murder when he useth a deadly weapon or manifests an intention to do great bodily harm." And in *S. v. McNeill*, 92 N. C., 816, *Judge Merrimon* was equally em-

phatic: "Words of reproach or insult, however grievous, do not make legal provocation, nor do indecent or provoking actions or gestures, expressive of contempt and reproach, unless accompanied with indignity to the person, as by a battery, or an assault, at least." *S. v. Tackett,* 8 N. C., 210; *S. v. Hill,* 20 N. C., 629 (491); *S. v. Barfield,* 30 N. C., 344; *S. v. Howell,* 31 N. C., 485; *S. v. Carter,* 76 N. C., 20.

In analogy to this principle the Court has upheld convictions under section 4378 for resisting an officer by means of intimidation or by a demonstration of force; but our researches have failed to discover any case in which the Court has held that words alone are sufficient for such purpose. *S. v. Morris,* 10 N. C., 389; *S. v. Garrett,* 60 N. C., 149; *S. v. Dunn,* 109 N. C., 839. Elsewhere it has been decided that neither spoken words alone nor the mere expression of an intention to resist is enough, but in order that words may constitute a resistance they must be spoken under circumstances which are calculated to deter an officer of ordinary courage and reasonable prudence in the discharge of a duty pertaining to his office. *S. v. Scott,* 17 Ann. Cas., 400, and note.

Section 7140 contains the words "willfully interfere with or obstruct." To procure a conviction under this section the State must show that the officer was obstructed or interfered with, and that such obstruction or interference was willful on the part of the defendant. We do not hold that actual violence or demonstration of force is indispensable to such obstruction or interference. To "interfere" is to check or hamper the action of the officer, or to do something which hinders or prevents or tends to prevent the performance of his legal duty; and to "obstruct" signifies direct or indirect opposition or resistance to the lawful discharge of his official duty. Century Dictionary; 6 Words and Phrases, 4890; 3 *ibid.,* (2 Series), 674; 22 Cyc., 1587.

In the present case there was no force or violence; but if the jury should find from the evidence that the defendant at the time used language or was guilty of conduct which was calculated and intended to put the officer in fear or to intimidate or impede him as a man of ordinary firmness in the present discharge of his official duties, and did thereby hinder or impede him, the defendant would be guilty. These, however, are questions of fact for determination by the jury, and not inferences of law for the decision of the court. Without submitting them as such questions of fact, his Honor peremptorily instructed the jury to convict the defendant if they found the evidence to be true. In this there was error which entitles the defendant to a new trial.

We have endeavored to consider the appeal entirely in its legal aspect, but we cannot refrain from expressing our unqualified condemnation of the defendant's coarse and obscene language. It was worse than reprehensible; it was utterly without color of excuse or ground of condonation.

New trial.

STATE v. WILL GRIFFITH.

(Filed 26 May, 1923.)

1. **Criminal Law—Tobacco Barns—Burnings—Statutes—Foot Tracks—Evidence—Identification.**

Upon the trial for the unlawful burning of a tobacco barn, C. S., 4244, there was evidence tending to show the foot tracks of the accused and another at the barn, discovered after the fire; that these two were seen by several drinking together during the night in question, and they were traced by their tracks to a mill that had also been fired the same night; that previously the accused and his companion said that the prosecutor was responsible for the breaking up of their illicit still by the officers at a prior time, and that they would get even with him. There was further evidence that a witness saw the accused and his companion together about 12:30 a. m. of the night in question, and after letting them pass, examined their tracks and found them identical with those traced from the barn destroyed: *Held*, sufficient of the accused's motive in burning the barn and of his identification as the one who set it afire, and to refuse a motion as of nonsuit; and the evidence of the tracks, etc., to the mill was not objectionable as tending to show his guilt of a different offense than the one charged.

2. **Instructions—Criminal Law—Reasonable Doubt—Appeal and Error.**

The charge of the trial judge in this criminal action upon the doctrine of reasonable doubt is not subject to valid objection.

3. **Criminal Law—Evidence—Appeal and Error.**

Where there is evidence tending to show that the defendant, indicted for the unlawful burning of a tobacco barn, and another, were seen drinking together on the night in question, each participating equally in the commission of the unlawful act, it is competent to show that thereafter his companion had fled the State to avoid arrest and trial.

APPEAL by defendant from *McElroy, J.*, at August Term, 1922, of DAVIE.

The defendant was convicted of burning a tobacco barn, and from the judgment upon such conviction, appealed to this Court.

Defendant's exceptions 5 and 6 were addressed to the refusal of the judge, at the conclusion of the State's evidence, to give judgment as of nonsuit against the State, and again at the conclusion of all the evidence.

The indictment was based upon C. S., 4244: "Every person convicted of the willful burning of any gin house or tobacco house, or any part thereof, shall be imprisoned in the State's Prison not less than two nor more than ten years."

The State's evidence tended to show that some time during the night of 23 December, 1920, a tobacco barn of J. W. Douthit, otherwise called Jack Douthit, was burned. The same night the sawmill of M. W. Allen was badly and evidently maliciously injured by the same persons, as the

State contended, who had burned the barn of Douthit. The defendant Will Griffith was identified with this burning by the following circumstances:

Tom Martin had fled and had never been arrested. Allen and Douthit —Allen at the time knowing nothing of the injury to his mill—upon hearing of the burning, and on the morning of 24 December, went to the place and found the barn a mass of smoldering ruins. At and near the barn they discovered two new and distinctive tracks. These tracks they followed from the barn, measuring them from time to time, and they being plainly made in plowed ground by two persons who manifestly were running. They followed these tracks to within one hundred yards of the defendant Will Griffith's house. There they saw Will Griffith coming from his home. After he had passed this time they immediately measured his track, as then made, and it corresponded exactly with one of the tracks made in going to and coming from the barn.

One of the men making these tracks had on a pair of rubber boots or shoes which fitted the longest track. The other was made by a kind of square-toed shoe. The latter corresponded precisely with the tracks made by Will Griffith when Douthit and Allen saw him coming from his house the next morning. They also corresponded with the tracks made to Will Griffith's house at the time the two men coming from the barn separated the night before. They followed the other track (the rubber-shoe track) towards the house of Tom Martin. They tracked them to within fifty or one hundred yards of Griffith's and Martin's houses. After the blunt-toed track, which led to Will Griffith's house, left the rubber-shoe track, the latter continued to Tom Martin's house. Then these two men, Douthit and Allen, went to the mill of M. W. Allen, having heard of the injury done to it, and found that at and near the mill were the same two tracks, the square-toed track and the rubber-shoe track.

A few days before this occurrence, the prosecuting witness, Douthit, and Mr. Allen, went along with prohibition officers to the "cutting up" of a still near the home of Douthit's mother. The defendant Griffith saw both Douthit and Allen going with the officers to this still place where the still outfit was cut up at the time. It is clear, not only from the State's evidence, but from the evidence of the defendant himself, on his cross-examination, that the defendant Will Griffith was engaged with Tom Martin in the liquor business. They were seen, on the afternoon of 23 December, drinking together, and drinking too much.

The witness Lee Wood testified that Griffith and Tom Martin passed his house about 12:30 on the morning of 23 December, going east toward their homes. J. L. Riddle testified that he saw both Will Griffith and Tom Martin on 24 December near Douthit's store, both drinking and

under the influence of liquor. Martin, in the presence of Griffith, referring to the Douthits, declared: "They have done us dirt, and we will get even with them," meaning that they had destroyed their still and that they would "get even with them," or punish them for it.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Holton & Holton and A. T. Grant, Jr., for defendant.

WALKER, J., after stating the case: We are of the opinion that the evidence, thus shortly stated, and interpreted according to the rule applied by this Court in determining the correctness of the ruling below refusing to grant judgment as of nonsuit, is sufficient to go to the jury upon the question of defendant's guilt. There was motive, opportunity, and direct evidence connecting him (Griffith) with the commission of the crime, which is to be inferred from the nature and character of the tracks which led to the houses of both men, the blunt-toed brogan-track to defendant Griffith's house, and the rubber-shoe track to Martin's house. As far as it is possible to identify tracks, these were shown to be those which had been made by defendant Griffith and Tom Martin, and conclusively so, if the witnesses were to be believed and their testimony was true. The defendant Griffith's testimony, if believed, showed an alibi, but as to this an issue was fairly submitted, and the jury, having found it against the defendant, evidently did not believe his evidence. Tom Martin was thus identified with the defendant Will Griffith, and Tom Martin left the country as soon as he found that he was indicted.

Defendant's exception 1 was addressed to this part of the testimony of Douthit on his redirect examination:

"Q. Where is Tom Martin? A. I don't know.

"Q. Has he left the country? (Defendant objects.) By the Court: 'I think that is competent, as they have introduced evidence tending to identify the tracks belonging to the two men.' Objection overruled, defendant excepts. A. Tom left the country when he found out he was indicted. He has not been in this country since that I know of."

The two men, according to all the evidence, were drinking together the afternoon of 23 December, were together when threats were made against Douthit by Martin, were together at 12:30 o'clock the morning of the burning, and the tracks were not only found side by side at the burned barn, but also at Allen's mill, and were followed from the barn, the one pair to Griffith's house, and the other pair to Martin's house. If ever two men were engaged in a common enterprise, these two men were. If, however, there was any error in the admission of this testimony, that error was cured by the testimony of the defendant himself.

Exception 2 was to the admission of testimony of two men running away from Allen's mill the night it was injured. The witness did not know either Will Griffith or Tom Martin, but it had been established by the State's evidence that the same men who burned Douthit's barn did the injury at Allen's mill, and this was a circumstance to show that two men at the time were engaged in both offenses, and is admissible on the score of common enterprise, or as evidence of identity.

Exceptions 3 and 4 were taken to evidence that was plainly admissible for the same reason stated under exception 2.

Exception 7 was to part of the judge's charge upon the doctrine of reasonable doubt. This, however, has no foundation, as the judge's charge will show, which was as follows:

"Now, gentlemen, these are the contentions of the State and defendant. The law presumes that this defendant is innocent, and presumption of innocence remains with him until the State satisfies you beyond a reasonable doubt of his guilt. And reasonable doubt is something different from a mere shadow of a doubt or fanciful doubt." The court, then, correctly explained to the jury what is meant by a reasonable doubt, and, after doing so, told the jury that upon due consideration of all the evidence in the case, if they were satisfied of the guilt of the defendant in the case, the State was entitled to a verdict. "In other words, the burden is on the State to satisfy you beyond a reasonable doubt of the guilt of this defendant. If the State has satisfied you beyond a reasonable doubt that the defendant, in company with Tom Martin, set fire to and burned the barn of Mr. Jake Douthit, on the night of 23 December, then, gentlemen of the jury, the court charges you that he is guilty, and it is your duty to so find, and if the State has failed to so satisfy you beyond a reasonable doubt of his guilt, it is your duty to give the defendant the benefit of any reasonable doubt there may be in your minds and return a verdict of not guilty."

As to the evidence relating to the tracks, see *S. v. Daniels,* 134 N. C., 641; *S. v. Adams,* 138 N. C., 688; *S. v. Hunter,* 143 N. C., 607; *S. v. Freeman,* 146 N. C., 615; *S. v. Taylor,* 159 N. C., 465. The case of *S. v. Adams, supra,* seems to answer several of the objections raised in this appeal, and especially with respect to evidence as to motive, the tracks, and as to what was discovered at the mill.

The object of introducing evidence as to the tracks of the two men leading up to the mill, which had been injured, was not to show that another and different crime had been committed, but of tracing up both sets of tracks, those leading to the barn and those which led to the mill, for the ultimate purpose of identifying the parties who made them as being the same persons, there being also some evidence tending to show, or from which the jury might infer, that they were seen the same night

at the mill, as well as at the barn which was burned. It was not that they were guilty of another and collateral offense, but rather as tending to prove that they were the same men who had applied the torch to the mill, by their continued association with each other that night. It was all one continuous and connected transaction, the effort being principally, if not wholly, to follow the tracks so as to fully identify these nightly marauders as being the persons who were also the incendiaries, and not to establish a distinct substantive offense in violation of the rule relied on by the prisoner, such as *S. v. McCall*, 131 N. C., 798; *S. v. Shuford*, 69 N. C., 487; *S. v. Frazier*, 118 N. C., 1257; *S. v. Alston*, 94 N. C., 930. The evidence also tended to establish, not only the identity of the persons who burned the mill, both by the tracks, and the malice they evidently had toward J. W. Douthit and M. W. Allen, the owners of the property destroyed, this supplying the motive for their conduct. If a person has the malice, or motive, to burn a mill (*S. v. Adams, supra*), and there are other means of identifying him as the culprit, both may be shown as evidence of his guilt, without being obnoxious to the rule, excluding facts relating to a separate, distinct, and collateral offense. There never was a clearer or more conclusive showing that the tracks were those of Griffith and his associate in the crime, and that they were out that night to avenge the destruction of the still, they being engaged in the illicit manufacture of whiskey. Whether the evidence was sufficient for a conviction was distinctly and solely for the jury to decide, there being some evidence of guilt, the jurors being the judges of its weight or strength.

There was no error in the case, and it will be so certified.

No error.

ADAMS, J. This opinion was written by MR. JUSTICE WALKER in accordance with the decision of the Court, but was filed and adopted after his death.

STATE v. H. B. HARBERT.

(Filed 8 June, 1923.)

1. Constitutional Law — Criminal Law — Indictment — Evidence—Fatal Variation.

It is the constitutional right of the defendant in a criminal action to be convicted, if at all, of the particular offense charged in the bill of indictment; and where he has been indicted for the larceny of an automobile owned by and in the possession of A., and the proof is that B. was such owner, there is a fatal variance between the charge and the proof.

upon which a conviction may not be sustained; nor can it be surmised upon the identity of the surname that A. and B. were man and wife, and that B. held the possession as the bailee of A.

2. Same—Nonsuit—Motions—Exceptions—Appeal and Error.

Where there is a fatal variance between the charge in a bill of indictment and the proof, the defendant may take advantage of it by his exception to the refusal of his motion to nonsuit, and have the error reviewed on appeal.

3. Criminal Law—Indictment—Evidence—Fatal Variation—Second Indictment.

Where there is a fatal variance between the charge in the indictment and the proof, as to the ownership of a stolen article, a conviction of the defendant may be had on another indictment properly charging the ownership of the stolen article.

CLARK, C. J., dissenting; CLARKSON, J., concurring in the dissenting opinion.

APPEAL by defendant from *Bryson, J.*, at January Term, 1923, of BUNCOMBE.

Criminal prosecution, tried upon an indictment charging the defendant with the larceny of an automobile.

From an adverse verdict and judgment of three years in the State's Prison, the defendant appealed, assigning errors.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

Reynolds, Reynolds & Howell and Billy Sullivan for defendant.

STACY, J. The bill of indictment charges the defendant with the larceny of "one automobile, owned by and in the possession of Frank Rosenberg." All the evidence on the record shows that the stolen automobile was owned by and in the possession of Mrs. Elsie Rosenberg. There is no evidence that Mrs. Elsie Rosenberg was the wife of Frank Rosenberg, or that she was related to him, or in any way associated with him. The suggestion that if all the evidence had been sent up, it *might* have shown Frank Rosenberg to be the husband of the prosecuting witness, and therefore, in possession of the car as bailee, merits no serious consideration at our hands. This is only a surmise. Maybe it would and maybe not. Cases are to be determined here upon the record. *S. v. Wheeler, ante,* 670.

There is a fatal variance between the indictment and the proof. This was conceded on the argument by the Assistant Attorney-General, Mr. Nash, who always presents his cases with great frankness and candor; and the only question for our decision is whether the defendant may take advantage of this defect by his exception to the overruling of his

motion for judgment as of nonsuit. We think he can, for there was a total failure of proof. Speaking to this question in *S. v. Gibson*, 169 N. C., 322, *Walker, J.*, said:

"You cannot amend an indictment—at least, against the will of the defendant. You must abide by its terms, and prove the charge as it is laid in the bill. A variance cannot be taken advantage of by motion in arrest of judgment. *S. v. Foushee*, 117 N. C., 766; *S. v. Ashford*, 120 N. C., 588; *S. v. Jarvis*, 129 N. C., 698. It is waived if there is no objection to it before the verdict is rendered, as those cases show. But a motion to nonsuit is a proper method of raising the question as to a variance. It is based on the assertion, not that there is no *proof* of a crime having been committed, but that there is none which tends to prove that the particular offense charged in the bill has been committed. In other words, the proof does not fit the allegation, and, therefore, leaves the latter without any evidence to sustain it. It challenges the right of the State to a verdict upon its own showing, and asks that the court, without submitting the case to the jury, decide as matter of law that the State has failed in its proof." See, also, *S. v.*, 170 N. C., 697.

In all criminal prosecutions the defendant has a constitutional right to be informed of the accusation against him; and it is a rule of universal observance in administering the criminal law that a defendant must be convicted, if convicted at all, of the particular offense charged in the bill of indictment. "The allegation and proof must correspond. It would be contrary to all rules of procedure and violative of his constitutional right to charge him with the commission of one crime and convict him of another and very different one. He is entitled to be informed of the accusation against him and to be tried accordingly." *Walker, J.*, in *S. v. Wilkerson*, 164 N. C., 444, citing as authority for the position: *S. v. Ray*, 92 N. C., 810; *S. v. Sloan*, 67 N. C., 357; *S. v. Lewis*, 93 N. C., 581; Clark's Cr. Proc., 150. See, also, *S. v. Snipes, ante*, 743, and cases there cited.

In *S. v. Davis*, 150 N. C., 851, the defendant was charged with obtaining a clay-bank mare by means of a false pretense as to the qualities of a "sorrel horse," and the proof was that he obtained the clay-bank mare in exchange for a bay "saddle horse." This was held to be a material variance, *Hoke, J.*, saying that "under the authorities there would seem to be a clear case of variance between the allegation and the proof, and the jury should have been so instructed." The charge related to one trade and the proof to another. Again it was held to be a fatal variance in *S. v. Hill*, 79 N. C., 656, "where the defendant was charged with injuring a cow, and the proof was that the animal injured was an ox." See, also, *S. v. McWhirter*, 141 N. C., 809; *S. v. Miller*, 93 N. C., 511; *S. v. Corbitt*, 46 N. C., 264.

The trial court should have sustained the defendant's motion and dismissed the indictment, but this will not prevent a conviction upon another bill charging the defendant with the larceny of an automobile, the property of Mrs. Elsie Rosenberg.

The present verdict will be set aside, the action dismissed, and the solicitor allowed to send another bill, if so advised.

Reversed.

CLARK, C. J., dissenting: The assignments of error that there was not sufficient evidence to go to the jury, and that the verdict was against the weight of evidence, do not require any consideration. It was very full and complete, and if believed, justified the verdict rendered.

It appears in the record that the indictment was for the larceny of an automobile, the property of Frank Rosenberg. The evidence of Mrs. Elsie Rosenberg is that she was the owner of the car. As to the steps taken to notify the authorities and the finding of the stolen machine there was no exception at the trial, nor in the assignments of error, nor in plaintiff's brief, nor in the argument here, that there was a fatal variance in the proof of ownership. It may be that the evidence, if set out in full, would have shown that Frank Rosenberg was her husband, and that he was bailee and in possession of the car. If so, the property was sufficiently laid in him. (*S. v. Allen,* 103 N. C., 433), and cases there cited and citations to that case in Anno. Ed.

It is true that when ownership is alleged it should be proven as charged, and failure to do so is a fatal variance. But, as said, 25 Cyc., 88, "ownership in a particular person is not an essential element in crime. The allegation is merely part of the description and identification of the goods." A motion for nonsuit or for arrest of judgment because the verdict is against the weight of evidence therefore does not bring up the question of variance between proof and allegation as to the ownership.

This has been expressly decided in this State. In *S. v. Baxter,* 82 N. C., 606, *Chief Justice Smith* passed upon this point, saying that "several answers may be made to the allegation of variance when made for the first time in this Court, *i. e.,* the case shows (1) that no question was made in regard to the allegation of property; (2) the variance should have been taken advantage of on the trial and by verdict of acquittal; (3) the objection cannot be made for the first time on appeal, and is not founded on error in law." This ruling is cited among other cases, by *Allen, J.,* in *S. v. Hawkins,* 155 N. C., 472, where there was a motion in arrest of judgment upon the ground that the State failed to prove the ownership in the town of Morganton as alleged, and this Court said, "If there had been a failure proved, the defendant should have

taken advantage of it by a prayer for instructions and not by motion in arrest of judgment. *S. v. Baxter,* 82 N. C., 606; *S. v. Harris,* 120 N. C., 578; *S. v. Huggins,* 126 N. C., 1056."

If it appeared, with the whole evidence before us, that there was a variance in the proof of ownership, exception on that ground should have been made before verdict, when the court could have allowed this to be remedied by proof that Frank Rosenberg was in possession of the car as bailee for his wife, which would have been sufficient to cure the alleged variance. Even if there was a variance, it was not a defect "in the proof of the crime" itself, which would be embraced by the motion to nonsuit, but it was merely a variance which was waived by failure to make the exception at the trial. *S. v. Baxter,* and other cases, *supra.*

S. v. Gibson, 169 N. C., 318, does not conflict with the holding of *Chief Justice Smith* in *S. v. Baxter, supra,* and *Judge Allen* in *S. v. Hawkins,* above quoted. In *S. v. Gibson, supra,* the charge was of obtaining money under false pretenses and the evidence shows that it was a note. This was a "failure of proof" as to an essential element in the defense—a defect in the evidence for which a nonsuit should have been granted, but the allegation of the ownership of articles stolen is not an element in the offense, but, as said in 25 Cyc., 88, *supra,* "the allegation of ownership in a particular person is not an essential element in the crime." "Such allegation is merely part of the description and identification of the goods, as *Judge Smith* says, and when there is no question made in regard to the allegation of ownership the variance must be taken advantage of in the trial, and cannot be made for the first time on appeal."

In *S. v. Gibson, supra,* the offense charged was false pretense in obtaining money, and the proof was of obtaining a note, which would be equivalent in a trial for larceny to charging the theft of a horse and proving the theft of an ox—a defect of proof for which a motion for nonsuit should have been made. The allegation of ownership, when not an essential element in the crime, has been dispensed with entirely in many classes of cases, especially, for instance, in selling whiskey or the name of persons whom it is intended to cheat or defraud. *S. v. Hedgecock, ante,* 714. Not being an essential element in the offense, but only for identification on a plea of former jeopardy, oral evidence is competent to show that it was or was not the same occurrence. This distinction clearly appears in *S. v. Gibson, supra,* on the second appeal, 170 N. C., 698.

In the present case, there was no constituent element in the charge which was not fully proven, and if there was a variance in the name of the owner of the article it should, as *Chief Justice Smith* and *Judge Allen* both state, have been called to the attention of the Court and "the

objection cannot be made for the first time on appeal." As has been well said, the object of a trial is to decide the matter in issue upon its merits and "not to set a trap for the judge." The defendant's counsel in this case did not set a trap for the judge, and he did not make the objection in this Court. Doubtless he knew the facts. If there had been any doubt as to the ownership of the property, he should (and doubtless would), have made the objection below as was held in *S. v. Baxter, supra,* and other cases above cited.

CLARKSON, J., concurs in dissent.

STATE v. GREEN SPENCER.

(Filed 8 June, 1923.)

1. **Criminal Law—Intoxicating Liquor—Evidence—Circumstance.**

   Upon the trial of defendant for having intoxicating liquor in his possession for the purpose of sale, testimony of a witness that defendant had come to his store smelling strongly of whiskey, and seemed nervous, is not objectionable when it is a circumstance in the chain of evidence sufficient to convict him.

2. **Criminal Law — Concealed Weapons — Evidence—Incriminatory Evidence—Constitutional Law.**

   It is not in contravention of the provisions of our Constitution for the State to require a defendant on trial for carrying a concealed weapon to testify whether he had it in a holster on the occasion concealed under his arm when the defendant had taken the stand to testify in his own behalf, the law as to self-incriminatory evidence not applying under the circumstances.

3. **Criminal Law—Evidence—Admissions—Instructions—Contentions.**

   It is not error for the trial judge to recite in his instructions to the jury as a contention of the State an admission made by defendant that he had carried a concealed weapon, upon his trial for that offense.

4. **Criminal Law—Concealed Weapons—Evidence—Statutes.**

   Time is not the essence of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. C. S., 4625.

5. **Constitutional Law—Intoxicating Liquors—Punishments—Sentence.**

   The duration of the sentence for a misdemeanor is within the sound discretion of the trial judge when no limitation is fixed by law; and a sentence of two years imprisonment for violating the prohibition law is not objectionable as a cruel and unusual punishment, prohibited by the Constitution.

APPEAL by defendant from *Shaw, J.,* at March Term, 1923, of FORSYTH.

STATE *v.* SPENCER.

The defendant was convicted at March Term, 1923, of Forsyth upon an indictment charging him with carrying a concealed weapon, and upon the charge of having in his possession intoxicating liquors for the purpose of sale. He was convicted of both charges and was sentenced to a term of two years on the public roads on the charge of violating the prohibition law and ninety days on the public roads on the conviction of carrying a concealed weapon, the sentence in the latter case to be concurrent with that in the other. In each case the defendant was not to wear a felon's stripes. The defendant made no motion for nonsuit. Appeal.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. T. Wilson for defendant.

CLARK, C. J. The defendant's exceptions 1 and 2 are to the admission of testimony that one night about 11 o'clock the defendant came to the store of the witness to get something to eat, and while there smelled strongly of whiskey, seemed nervous, and asked how far it was to Walkertown. The defendant's counsel in his brief claimed this evidence was not admissible. It was, however, merely a circumstance in the chain of evidence which was that the next morning after this visit to the store the witness found the car broken down right below the store, and by the time he got close to it he could smell whiskey round there. He found in the car tow sacks soaked with whiskey, and noticed tracks leading from the car around the edge of a tobacco patch. There had been apparently two or more trips going and coming. He traced these tracks about 75 yards from the broken-down car, and there he found 79 half-gallon fruit jars filled with whiskey.

Exceptions 3 and 4 are that the defendant, in his cross-examination, testified that he carried his pistol in a holster near his codefendant Martin's house, and he left it there the morning he was arrested. The solicitor then asked this question: "You went up there Saturday and carried your pistol in a holster under your arm?" Defendant objected. Defendant's objection overruled, and he answered, "Yes." There is nothing in this exception, because when he put himself on the witness stand he was subject to cross-examination. The pistol was discovered covered up with pine leaves about 50 or 75 yards up the road from the liquor. The weapon was not found upon Spencer, and no liquor was found upon him. The provision in the Constitution that no one shall be compelled to give evidence against himself does not apply when the defendant voluntarily puts himself on the stand. Neither was it error for the court to recite that the State contended that according to the

defendant's own admission on the stand he went to the house and carried his pistol with him in his holster under his arm.

The defendant excepted because the court charged that if the jury found "beyond a reasonable doubt from the testimony that the defendant had concealed that pistol with the intent to conceal it," he would be guilty. The State is not confined to any one time, but could show that the offense was committed at any time prior to 26 February, the time alleged in the bill, for the State can allege one time and prove another. C. S., 4625, provides that in cases like this where time is not an essence of defense it is not error to omit to state the time in the indictment, or to state it imperfectly, or to state the occurrence as having happened on an impossible day, or a day subsequent to filing the indictment. The evidence as to carrying the pistol at the time the car broke down was very strong evidence that the defendant had it at that time.

In *S. v. Lawhorn,* 88 N. C., 634, it was held that the defendant waived the privilege of refusing to answer questions which tended to incriminate him by going upon the stand to testify in his own behalf. This has been since approved in *S. v. Thomas,* 98 N. C., 599; *S. v. Allen,* 107 N. C., 805; *S. v. Simonds,* 154 N. C., 197. In the latter case it is held that by going upon the stand in his own behalf the defendant waived the constitutional privilege not to answer questions tending to incriminate himself, both as to other and distinct crimes, as well as to prove the offense with which he stands charged.

The last assignment of error is that the court inflicted cruel and undue punishment upon this defendant in sentencing him to two years imprisonment for violation of the prohibition law, but it has always been held that when there is no limitation to the punishment for misdemeanor, this matter is in the sound discretion of the court, and two years for this offense is not excessive nor unusual. *S. v. Farrington,* 141 N. C., 845, citing *S. v. Hicks,* 101 N. C., 747; *S. v. Miller,* 94 N. C., 904. An offense of this kind, which is committed deliberately with premeditation and for the purpose of making a profit at the expense of a contemptuous violation of the law is not excessively punished by a sentence to the roads for two years. Both by the State and Federal law, the second offense against the prohibition law, if in respect of manufacturing liquor, or assisting to do so, and the same is true of selling liquor in certain cases, *S. v. Mull,* 178 N. C., 748, is a felony punishable by imprisonment in the penitentiary.

No error.

STATE v. JOHN STEEN.

(Filed 8 June, 1923.)

1. Evidence—Witnesses—Character—Hearsay.

A character witness is confined to the general reputation of the person whose character is attacked or supported, in the community in which he lives, depending upon what the witness has heard or learned as to the general opinion of his standing in the community, evidence of this kind being a matter of hearsay.

2. Same—Investigation of Character.

The law-abiding citizens of a town associated themselves together for the purpose of aiding the enforcement of law and order, especially the prohibition law, which was being extensively violated there, and for the purpose employed a detective from another state to investigate and procure evidence for a conviction: *Held*, competent, the testimony of a citizen of the town and a man of high character, who was sent to the community in which the detective resided for the purpose of investigation, and in anticipated attack upon his evidence, that he had made an investigation of the witness's character, and he would say it was good.

3. Same—Appeal and Error—Objections and Exceptions.

The question as to whether a character witness has qualified himself to give his testimony by first saying he knew the general reputation of the person, is not presented on appeal, when no exception has been taken on that ground in the appellant's brief, but only to his answer to the question, after he has stated a proper ground upon which he had based his opinion.

ADAMS and CLARKSON, JJ., concurring; HOKE and STACY, JJ., dissenting, STACY, J., writing the dissenting opinion.

APPEAL by defendant from *Long, J.*, at October Term, 1922, of RICHMOND.

The defendant was convicted upon two bills of indictment charging sales of liquor to one Harry Sapphire. It appears from the evidence that conditions as to "bootlegging" in that town and county were such that the good citizens of the town of Rockingham organized a club to secure the enforcement of laws, among them W. N. Everett, now Secretary of State, and Walter L. Parsons, formerly a Senator, and other prominent and well known citizens of the State, as appears from the affidavits in the record, of which Mr. Everett's is a sample, that "there has been such widespread violation of the liquor laws in Richmond County, and that by reason of the numerous reports of violations and the inability of the officers of the town and county to arrest the violators of such laws on account of such officers being generally known, and the violators of such laws through their organization being kept posted on the movements of such officers, the boards of town and county commissioners, through their mayor and chairman, respectively, have agreed to

have the violation of the liquor laws investigated by an outside representative, and to prosecute any and all persons dealing in liquor." His affidavit further states that the "boards of town and county commissioners have been actuated by the highest motives in the employment of an investigator to ascertain violation of the liquor laws; that such action on the part of said boards has been for the best interests of the town and county, and with regard and pursuant to their duties as such commissioners," and that "the McLendon Club is an organization of Christian men of Richmond County, formed for the purpose of fostering Christian ideals, and to secure enforcement of all laws of the State," and was not "an organization to persecute any person or persons, but to prosecute any and all violators of the law."

There are a large number of affidavits in the record to sustain the action taken to procure the investigation of such violations. In order to ferret out the guilty parties, a detective from Atlanta was secured, with whose aid evidence was laid before the grand jury, indictments were found, and on trial the defendant was convicted of violation of the liquor laws in two cases.

Knowing that an attack would naturally be made upon the character of the detective, A. G. Corpening, one of the town commissioners, went to Atlanta after the preliminary hearing of the case against the defendant, and shortly before the trial in the Superior Court, to investigate as to his character. At the trial the following question was asked, "Mr. Corpening, have you made any investigation of Mr. Sapphire's character?" Objection by defendant, overruled, and exception. To the above question the witness replied, "I made a trip to Atlanta and made a personal investigation, and from my investigation I would say his character was good." This exception presents the only question necessary to consider in this action.

Attorney-General Manning and Assistant Attorney-General Nash for the State.

W. R. Jones for defendant.

CLARK, C. J. The evidence as to the guilt of the defendant is practically without exception, but the defendant insists that this matter as to the character of the witness is fatal. The defendant's counsel, in his brief, raises no objection to the fact that the usual preliminary question was not put to this witness: "Do you know the general character of the witness Sapphire?" but bases his objection entirely upon the character of the testimony given in by Mr. Corpening, "Mr. Corpening swears that Sapphire's character was good, and states the ground for his testi-

mony; that he made the trip to Atlanta, made a personal investigation, and from his investigation would say that Sapphire's character was good."

From the record and the large number of affidavits filed, it is apparent that conditions were such in Rockingham and Richmond County that the good citizens organized what was called the "McLendon Club" to secure the enforcement of laws of the State. The board of commissioners of the town and county thought it necessary, in order to break up the great amount of whiskey dealing in said town and county, to employ a detective. They obtained from the detective agency in Atlanta, Harry Sapphire, one of their agents. He came to Rockingham, went to work and secured much of the evidence upon which the defendant was convicted. His residence was in Atlanta. The defendant contends that Corpening's testimony as to the evidence of general reputation obtained in this manner is not admissible. There is evidence of Corpening's high character. It would seem that being sent there by the officials of the town and by the good people who organized for the purpose of enforcing the law, that his motives could not be questioned, but however that might be, it was for the jury, his fellow-citizens, to weigh his testimony. It was just to the defendant as well as to the State to ascertain the character of the witness Sapphire. Evidence as to Sapphire's character could not otherwise well have been placed before the jury other than by the method used. Depositions by witnesses living in Atlanta would not have been competent, nor could witnesses have been brought from there as to Sapphire's character, for that would have required proof of the character of such witnesses themselves. The jury were entitled to know Sapphire's character, which could not have been proven in any better way than by sending, as was done, a reliable, well known citizen of the county and of the town to investigate his standing and general character in Atlanta, where he lived. It is reasonable that under these circumstances Corpening was better informed as to the general character of Sapphire than the casual acquaintances, who are usually brought forward as character witnesses.

In North Carolina the testimony of a character witness is confined to the general reputation of the person whose character is attacked, or supported, in the community in which he lives. *S. v. Parks*, 25 N. C., 296; *S. v. Perkins*, 66 N. C., 126; *S. v. Gee*, 92 N. C., 756; *S. v. Wheeler*, 104 N. C., 893; *S. v. Coley*, 114 N. C., 879, and numerous other cases since. Reputation is the general opinion, good or bad, held of a person by those of a community in which he resides. This is eminently a matter of hearsay, based upon what the witness has heard or learned, not as to any particular acts, but as to the general opinion or standing in the community.

Corpening's testimony could not be excluded as hearsay, for that is general reputation. The question was, What was Sapphire's general reputation in Atlanta, where he lived? If a resident of Atlanta had been brought as a witness at this trial, and put upon the stand, he might have testified that he had never heard anything against Sapphire's character in Atlanta, and his testimony would have been admissible, its weight being left to the jury, as was Corpening's.

Corpening himself was well known to the jury. He stated in effect that he had been to Atlanta, that he had investigated as to the reputation—that is, the general character that Sapphire bore there, and his evidence being based upon such investigation, as he states, was certainly not inferior to the statements of casual acquaintances or others who are so often put upon the stand as character witnesses, and whose testimony is necessarily based upon hearsay—that is, what people say in regard to the person whose character is in question.

The defendant relied strenuously upon what was said in *S. v. Parks,* 25 N. C., 296. In that case Johnathan Worth was put upon the stand to impeach the character of one Lane. Worth, upon cross-examination, stated that he "did not know Lane's general character in his neighborhood; that he was not certain that he knew his general character in the county; that he did not know whether a majority of those he heard speak spoke well or ill of it, but that he had heard a great many respectable men speak well of Lane's character and a great many equally respectable speak ill of it." In that case the Court held that the testimony of Worth was erroneously received, because "the witness is not to be discredited because of the opinion which any person, or any number of persons, may have expressed to his disadvantage, unless such opinions have created or indicated a general reputation of his want of moral principle. The impeached witness must, therefore, profess to know the general reputation of the witness sought to be discredited before he can be heard to speak of his own opinion or others as to the reliance to be placed upon the testimony of the impeached witness. *S. v. Boswell,* 13 N. C., 209; *Downey v. Smith,* 18 N. C., 62." In that case Jonathan Worth expressly stated that he did not know the general character of Lane, that he had heard a great many people speak both for and against him. It is very certain, therefore, that his testimony as to the character of Lane should have been rejected.

The present case is in strong contrast. The witness testified that he went to Atlanta to ascertain what was the general reputation of the impeached witness. That he had investigated, and that implies, of course, that under all these circumstances he had made careful inquiry such as could have been produced before the jury if the trial had taken

place in Atlanta, and that as a result of his investigation he would say that Sapphire's character was good.

The issue in this case was as to the violation of law alleged against the defendant. The question as to character of Sapphire, one of the witnesses against him, was, so to speak, entirely collateral. It was intended only to give to the jury some estimate of the weight they should give to the testimony of the witness Sapphire. The officials and leading public citizens had taken the trouble and been at the expense of sending Corpening (who was admittedly a man of high character in the community) to Atlanta to inquire as to the general reputation of the witness Sapphire. This speaks well for their sense of justice. The jury have passed upon the credibility of Corpening. Unlike Jonathan Worth in the case above quoted, Corpening stated that he had investigated as to Sapphire's character, and would say from such investigation that it was good.

It is rarely that the character witness can testify from investigation as to the good or bad character of the witness to which he testified. It was open to the defendant to bring witnesses from Atlanta to testify, if they could have done so, that Sapphire's general character was bad in that community. The good citizens of Rockingham, in enforcing the law, wished to be just. There is no question that the testimony, if believed by the jury, was that Corpening had gone to Atlanta for the purpose of ascertaining the general reputation of Sapphire among the people who knew him, that he had carefully investigated it, and that he had found that his general reputation was good.

It is not often that a character witness can show himself so competent to testify as to the character of another, as Corpening on this occasion. His testimony was properly submitted to the jury for what weight they saw fit to give it.

After the fullest and most careful consideration of this case, we find

No error.

ADAMS, J., concurring: The defendant relies upon three exceptions, neither of which in my judgment can be sustained, and for this reason I do not hesitate to concur in the opinion of the Court as written by the *Chief Justice.*

1. The defendant entered a formal motion to quash the indictment on the ground that certain members of the grand jury, by whom the bill was returned, were directly or indirectly interested in the prosecution of the defendant; but both the opinion of the Court and the dissenting opinion of *Associate Justice Stacy, sub silentio,* admit that this exception requires no discussion.

2. The defendant's exception to his Honor's charge, I am convinced is equally untenable. It is freely conceded that the burden of proving an *alibi* does not rest upon the defendant, and that it is incumbent upon the State to establish his guilt beyond a reasonable doubt; but, as I see it, the instruction complained of strictly complies with these principles. If there is one ruling to which this Court has adhered, it is that the instructions given by a trial judge shall be considered in their entirety and not in disjointed, detached, or isolated paragraphs; and when thus treated, his Honor's charge was less favorable to the State than were several other charges that have been sustained on appeal. With respect to the *alibi,* the judge gave this instruction: "If one accused of crime, when the time and place of the commission of the alleged crime is fixed, can show, and does show, that at that time, and at the place alleged, that he was not there, and it would have been impossible for him to have committed the crime, that is evidence that the jury may consider in passing upon the question, and if it is established he could not have committed the crime on account of being elsewhere at the time and place fixed, why that would be a defense." And at the close of the charge he said: "Now, are you satisfied beyond a reasonable doubt that this defendant made these sales as charged by the State? These sales of spirituous liquor to Mr. Sapphire? If so, it would be your duty to convict him. If you have a reasonable doubt about it, it would be your duty to acquit."

In *S. v. Freeman,* 100 N. C., 429, the trial judge, after telling the jury that the burden was upon the State to show the defendant's guilt beyond a reasonable doubt, gave this additional instruction: "The rule of law is, in a case of this kind, where the prisoner sets up the defense of an *alibi*—that is, that he was at some other place at the time when the crime was committed—the burden of proof rests on the prisoner to establish the fact to the satisfaction of the jury that he was not present, but was at some other place when the crime was committed. If the jury is satisfied from the evidence that the prisoner remained at home on the night in question, this would be an end of the case, and the prisoner should be acquitted; but if they are not satisfied of the truth of the *alibi,* then it is for them to say whether they are satisfied beyond a reasonable doubt that the rape was committed upon the person of the prosecutrix by the prisoner, as alleged by the State." Commenting on the charge, *Chief Justice Smith* said: "While we do not assent to what is said about the shifting of the burden of proof, when the proof offered by the prisoner tends to show his absence from the place where the offense was perpetrated, and his presence elsewhere at the time, yet the charge in general is so clear and explicit as to what is required of the State in

order to a conviction that it could not be misleading to the jurors, fairly considered."

And in *S. v. Bryant,* 178 N. C., 705, *Mr. Justice Walker* said: "The judge's charge on the question of the *alibi* was, it seems to us, not prejudicial to the defendant. He charged substantially that the prisoner relies upon an *alibi,* which means that he was not, and could not have been at the place of the homicide when it was committed, as he was elsewhere at the time. He is not required to satisfy you of the *alibi* beyond a reasonable doubt, but if the jury is satisfied from the evidence that he was not at the place when the homicide was committed, and at the time when the deceased met her death, then a verdict of not guilty should be returned, etc. But if the jury is not so satisfied, then it is for the jury to consider all the evidence and say whether or not they are satisfied from the evidence, beyond a reasonable doubt, that the prisoner killed the deceased, etc. This instruction was not erroneous, but followed our decisions. *S. v. Jaynes,* 78 N. C., 504; *S. v. Reitz,* 83 N. C., 634; *S. v. Starnes,* 94 N. C., 973; *S. v. Freeman,* 100 N. C., 429; *S. v. Rochelle,* 156 N. C., 641."

In these cases the court expressly or substantially imposed upon the defendant the burden of proving his *alibi,* and in each case the instruction was sustained. But in the instant case the learned judge did not go so far. As I understand them, his instructions, taken together, mean this: If the defendant showed that he was at the particular places designated by his witnesses when the sales were made, this would be a defense; but even if he failed to do so, the burden would still rest upon the State to satisfy the jury beyond a reasonable doubt that he made the sales at the dates and places testified to by the witnesses for the prosecution.

The instruction is in line with the decisions of this Court.

3. In considering the exception referring to the testimony of A. G. Corpening, it is important to keep in view the restricted scope of the examination, and to avoid confusion by the insertion of extraneous and unrelated questions.

Our decisions have unquestionably settled the principle that a witness will not be allowed to testify as to general character until he shall have first qualified himself by saying that he knows the reputation of the person whose character is in question, when objection is made on that ground, but I think this is not the ground presented in the defendant's brief. The *Chief Justice* has well said that the defendant raises no objection to the fact that the usual preliminary question was not put to the witness, and his conclusion is abundantly supported by the defendant's brief. Apart from reference to certain portions of his Honor's charge, the learned counsel states the gravamen of his exception in these

words: "It is a fundamental principle of character evidence that the witness must have the foundation for forming his opinion or the means of knowing the general character of the party." Emphasis is laid not on the knowledge acquired, but on the means by which it is acquired, "the foundation for forming his opinion." To this one question the argument was addressed, and it appears that the only attack on the admission of the evidence or the qualification of the witness rests on the admitted fact that he went to Atlanta and investigated Sapphire's character; so the exception presents the direct question whether evidence as to character, based on knowledge acquired by such investigation, is admissible as a matter of law.

In opposition it is urged that the witness necessarily speaks, not of his own knowledge, but of what he has learned. True, what another has told the witness about one's character is not competent in itself (*S. v. Mills,* 184 N. C., 694), but in its ultimate analysis a witness's estimate of general character is a composite of what he has heard and otherwise acquired. I find nothing in the record restricting the witness's knowledge to what he had heard. Whether it was so restricted was a matter to be elicited by cross-examination. Greenleaf very clearly draws the distinction between character and reputation (1 Ev., sec. 461-d), but in our courts "general character" is treated in actual practice as synonymous with general reputation. Upon this principle it is generally held, as shown by cases cited in the dissenting opinion, that it is not indispensable that a witness should have resided in the same community with the person of whose character he proposes to testify, the chief requirement being that the witness's knowledge must be derived from intercourse with the neighbors or associates of the person whose character is in question. I can see no convincing reason why such knowledge cannot be acquired by one who goes into a particular community for the particular purpose of attaining this end. Whether the witness has actually acquired such knowledge may in some instances be a preliminary question for the court when properly raised, and in others a question for the jury, but this does not warrant the assumption that such knowledge cannot be acquired in the manner indicated.

Again, it is said that if this practice is allowed it will be possible for a party to procure the testimony of prejudiced witnesses. In its practical operation this objection may be urged against the law as it now stands. In a criminal action the State can neither compel the attendance nor take the deposition of a nonresident witness. But the defendant is not precluded; he has the right to introduce the deposition of witnesses, resident and nonresident. The objection, practically applied, would confer upon the defendant in such action exclusive access to the testimony of nonresident witnesses, prejudiced or otherwise, subject, of

course, to cross-examination by the State. What doctrine could impart greater solace to a defendant whose conviction depended on the testimony of a nonresident witness?

The two cases apparently supporting the exception are *Douglass v. Tousey,* 20 A. D. (N. Y.), 616, and *Reid v. Reid,* 17 N. J. Eq., 101, but they are distinguishable from the case at bar. In the former a witness went to another part of the State to subpœna witnesses and "learn the character" of the prosecutrix, but there being evidence only of the witness's subjective opinion, the proposed evidence was excluded as hearsay. And in *Reid's case, supra,* the witness merely detailed the opinions of others. On the other hand, in *Foulkes v. Sellway,* 3 Esp., 236, *Lord Kenyon* sustained the testimony of a witness who had gone to the place where the plaintiff lived to inquire into his character.

My conclusion is this: living in the same community with a witness whose character is under investigation is not indispensable to a knowledge of his character, for as Greenleaf says the witness to reputation must be one who by residence in the community, or otherwise, has had an opportunity to learn the community's estimate; and if the witness has knowledge of such estimate he is qualified to testify. I think my conclusion is sustained by the general trend of the decisions.

CLARKSON, J., concurring: After a witness has been examined in chief, his credit may be sustained or impeached in various modes: (1) By proving or disproving the facts stated by him, by the testimony of other witnesses; (2) by general evidence affecting his credit for truth and veracity or general moral character. The regular mode of examining into the general reputation is to inquire of the witness whether he knows the general reputation of the person in question among his neighbors, and what that reputation is. Greenleaf on Evidence, vol. 1 (15 ed.), sec. 461; *S. v. Efler,* 85 N. C., 585. This law and practice has been long recognized by our courts.

While upholding the rule of evidence stated in the exhaustive dissenting opinion of *Associate Justice Stacy,* I think upon the whole record the defendant is not entitled to a new trial. "It is now the settled rule of appellate courts that verdicts and judgments will not be set aside for harmless error, or for mere error and no more. To accomplish this result, it must be made to appear not only that the ruling complained of was erroneous, but that it was material and prejudicial, amounting to a denial of some substantial right. Our system of appeals, providing for a review of the trial court on questions of law, is founded upon sound public policy, and appellate courts will not encourage litigation by reversing judgments for slight error, or for stated objections, which could not have prejudiced the rights of appellate in any material way." *In re Ross,* 182 N. C., 478.

STACY, J., dissenting: The principal evidence against the defendant was that given by Harry Sapphire, a detective, who testified that he had purchased liquor from the defendant on five different occasions. The jury convicted on two counts and acquitted on three, though the evidence on all five of the charges was of the same character.

In support of Sapphire's testimony, the State offered A. G. Corpening, a character witness, who testified as follows:

"Q. Have you made any investigation of Mr. Sapphire and his character? (Objection; overruled; exception by defendant.) A. I made a trip to Atlanta and made a personal investigation, and from my investigation I would say his character was good."

"And to the overruling of the objection and admission of the answer the defendant excepts."

To my mind the natural and correct interpretation to be placed on the testimony of A. G. Corpening is that he was not undertaking to speak of his own knowledge concerning the character of the witness Sapphire, but was giving the result of his investigation, or the conclusion reached by him, from what others had told him, or from what he had learned about the witness in Atlanta. The record is silent as to whether this investigation was long or short, or whether it was made among friends and acquaintances or strangers, or whether his informers were few or many. He does not say that he knows the general reputation or character of the witness, and this is a necessary prerequisite or qualification to his right to testify under our decisions.

"It is fully recognized that in the trial of causes the testimony of a witness may be impeached by evidence of his bad character; and it is equally well established that before this is allowed the impeaching witness must qualify himself by saying, under oath, that he knows what such character is." *Hoke, J.*, in *S. v. Mills,* 184 N. C., 695.

"No principle of evidence is more clearly settled in North Carolina, nor by a longer line of decisions, than that a witness will not be allowed to testify as to character until he shall have first qualified himself by stating that he knows the reputation of the person in question." *Avery, J.*, in *S. v. Coley,* 114 N. C., 879.

"The witness is not to be discredited, because of the opinions which any person or any number of persons may have expressed to his disadvantage, unless such opinions have created or indicate a *general reputation* of his want of moral principle. The impeaching witness must, therefore, profess to know the general reputation of the witness sought to be discredited before he can be heard to speak of his own opinion or of the opinion of others, as to the reliance to be placed on the testimony of the impeached witness." *Gaston, J.*, in *S. v. Parks,* 25 N. C., 296.

"The rule as to this matter has been fully settled by many decisions of this Court. It is this: The party himself, when he goes upon the witness stand, can be asked questions as to particular acts, impeaching his character, but as to other witnesses it is only competent to ask the witness if he 'knows the general character of the party.' If he answers 'No,' he must be stood aside. If he answers 'Yes,' then the witness can, of his own accord, qualify his testimony as to what extent the character of the party attacked is good or bad." *Clark, C. J.*, in *Edwards v. Price*, 162 N. C., 244. See, also, *S. v. Haywood*, 182 N. C., 815; *S. v. Killian*, 173 N. C., 796; *Tillotson v. Currin*, 176 N. C., 484; *S. v. Robertson*, 166 N. C., 356; *S. v. Holly*, 155 N. C., 485; *S. v. Ussery*, 118 N. C., 1177; *S. v. Gee*, 92 N. C., 760.

An impeaching or sustaining witness is not to speak of the general reputation or character of another unless he knows it, and such knowledge must be founded on an acquaintance and intercourse with the neighbors or associates of the person whose character is in question. This intercourse, of necessity, must be of some length of time sufficient, at least, to enable the witness to gather the general esteem or estimation in which the party is held in the community where he resides, or at the place where he carries on his business. *Curtis v. Fay*, 37 Barb., 64. It is not indispensable that the witness should have resided in the same community with the person, of whose character he proposes to testify (though the contrary is supported by authority), but he must speak of his own knowledge and not merely from what others have told him, for this would be no more than reputation of reputation, or hearsay. *S. v. Lambert*, 104 Me., 394; *Reid v. Reid*, 17 N. J. Eq., 101; *Douglass v. Tousey*, 2 Wend., 352; 20 Am. Dec., 616, and note; 10 R. C. L., 954.

"It is not enough that the impeaching witness professes merely to state what he has heard 'others say'; for those others may be but few. He must be able to state what is *generally said* of the person, by those among whom he dwells, or with whom he is chiefly conversant; for it is this only that constitutes his general reputation or character. And, ordinarily, the witness ought himself to come from the neighborhood of the person whose character is in question. If he is a stranger, sent thither by the adverse party to learn his character, he will not be allowed to testify as to the result of his inquiries; but otherwise, the court will not undertake to determine, by a preliminary inquiry, whether the impeaching witness has sufficient knowledge of the fact to enable him to testify; but will leave the value of his testimony to be determined by the jury." Greenleaf on Evidence, sec. 461.

"In order to discredit a witness, you can examine only to his general character. . . . But it was remarked by plaintiff's counsel that witnesses do not always understand what is meant by general character;

and, therefore, it is necessary to vary the question, so as to adapt it to their comprehension. That is true, and therefore there is no impropriety in proposing the question in various forms, so that the substance be retained. But you must never depart from general character. . . . There are few men of whom some do not speak well, and some evil. ('Woe unto you when all men shall speak well of you.' Luke, 6:26.) But the question is, What is said by people in general? This is the true point of inquiry, and everything which stops short of it is incorrect." *Tilghman, C. J.,* in *Wike v. Lightner,* 11 Ser. & Rawle, p. 199.

"When it is attempted to impeach a witness on account of a want of moral character, it cannot be done by the impeaching witness 'merely stating what he has heard others say, for those others may be but few. He must be able to state what is generally said of a person, by those among whom he dwells or with whom he is chiefly conversant, for it is this only which constitutes his general character.'" *Mr. Justice Wayne* in *Gaines v. Helf et al.,* 12 How., 555.

"(The witness to reputation) must be able to state what is generally said of the person by those among whom he dwells, or with whom he is chiefly conversant, not by those among or with whom he may have sojourned for a brief period, and who have had neither time nor opportunity to test his conduct, acts, or declarations, or to form a correct estimate of either. A man's character is to be judged by the general tenor and current of his life, and not by a mere episode in it." *Brace, J.,* in *Waddingham v. Hulett,* 92 Mo., 533. See, also, Wigmore on Evidence, sec. 1616, and cases there cited.

In *Mawson v. Hartsink,* 4 Esp. Rep. (Eng.), 103 (cited with approval in *S. v. O'Neale,* 26 N. C., 88), an impeaching witness was asked to state whether he had made particular inquiries as to the general character of a witness about which he proposed to testify. *Lord Ellenborough* ruled that the question was improper, and gave the following reasons for his position: "That cannot be evidence. That information must be from persons not on their oaths; perhaps not reliable. If this were allowed, when it was known that a witness was likely to be called, it would be possible for the opposite party to send around to persons who had prejudices against him, and from thence to form an opinion, which was afterwards to be told in court, to destroy his credit."

The words of *Lord Ellenborough* are particularly appropriate here, for, to my mind, the precedent we are setting is a dangerous one. In the *O'Neale case,* 26 N. C., 88, an impeaching witness was asked if he knew the general character of another witness. He replied that he did not know whether he did or not. He was then asked "whether he knew in what estimation Elizabeth Earnest was held in his neighborhood before she left it." The Court said the latter question was properly

excluded because it was too circumscribed, and did not amount to an inquiry as to her *general* character before she left the neighborhood. It will be observed that in the case at bar the witness does not even purport to speak of *general* character; but I do not place my dissent on this ground. That would be too narrow and technical. Where the testimony of a character witness is objected to, as it is here, he should be required to qualify himself by first saying that he knows the general character of the witness, or party, before he is allowed to give his testimony in evidence. This is the direct holding with us in a number of cases heretofore cited. See, also, *S. v. Wheeler*, 104 N. C., 893; *S. v. Hairston*, 121 N. C., 582; *S. v. Efler*, 85 N. C., 585.

Again, in *S. v. Boswell*, 13 N. C., 211, *Toomer, J.*, speaking directly to the question now under consideration, used the following language: "A witness introduced to impeach the general character of another should not be permitted to give evidence of particular facts, nor repeat hearsay of strangers to the witness, whose testimony is intended to be discredited. He should only speak of the general moral character of the witness, as known among his neighbors and acquaintances. The discrediting witness should not express an opinion founded on his knowledge of particular facts, nor upon the hearsay of strangers to the witness intended to be discredited." Some of the expressions employed in this opinion were subsequently disapproved in *Hooper v. Moore*, 48 N. C., 430; but, in no case, has the above portion of the opinion been overruled, criticised, or disapproved. On the other hand, this language was quoted with approval by *Smith, C. J.*, in *S. v. Bullard*, 100 N. C., 488; and, indeed, its correctness can hardly be the subject of cavil or debate. See *McQuiggan v. Ladd*, 79 B. T., 90; 14 L. R. A. (N. S.), 689, and note; *People v. Van Gaasbeck*, 189 N. Y., 408; 22 L. R. A. (N. S.), 650, and note. This latter note contains an exhaustive review of the English and American authorities on the subject.

By the general character or reputation of every individual, that is, by the estimation in which he is held in the society or neighborhood where he is known, his word and his oath are valued. If his general character be free from imputation, his testimony weighs well. But if it be sullied, in the same proportion his word will be doubted. An impeaching or sustaining witness should speak only of his own knowledge, and then only with regard to the settled judgment or estimate of the community, touching the moral stamina or worth of the party whose character is in question. "Character," said *Mr. Erskine*, in the trial of Thomas Hardy for treason, "is the slow-spreading influence of opinion, arising from the deportment of a man in society. As a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion, that general opinion is allowed to

be given in evidence." 24 State Trials, p. 1079. The rule is that where an impeaching or sustaining witness is called, he must first qualify himself by saying whether he knows the general reputation or character of the witness or party about which he proposes to testify. If he answer that he does not, he should be stood aside without being cross-examined on the subject. And if he reply in the affirmative, he should be confined to general reputation or character. This is not an idle matter; for, in many cases, its proper enforcement is essential to a fair and impartial administration of justice. Due process of law is something more than a high-sounding phrase; and the well established rules of evidence have been adopted, not merely for book-writing and law-school instruction, but the primary purpose of such adoption is for actual observance in the trial of causes.

Again, the defendant excepts to the following part of the charge: "If one accused of crime—when the time and place of the commission of the alleged crime is fixed, can show and does show that at that time and at the place alleged, that he was not there, and it would have been impossible for him to have committed the crime, that is evidence that the jury may consider passing upon the question, and if it is established he could not have committed the crime on account of being elsewhere at the time and placed fixed, why that would be a defense."

The foregoing is all that was said to the jury in regard to the defendant's alibi. True, in the closing paragraph of the charge, his Honor instructed the jury that they must be satisfied beyond a reasonable doubt of the defendant's guilt before a verdict could be rendered against him, and that, if they had a reasonable doubt about it, it would be their duty to acquit the defendant. But this was far removed from the above instruction, which forms the basis of the defendant's fifth exception.

In *S. v. Jaynes,* 78 N. C., 504, it was said: "The burden of proving an alibi did not rest upon the prisoner. The burden remained upon the State to satisfy the jury upon the whole evidence of the guilt of the prisoner. It was only necessary for the prisoner in his defense to produce such an amount of testimony, whether by evidence tending to show an alibi or otherwise, as to produce in the minds of the jury a reasonable doubt of his guilt." To like effect are the following cases: *S. v. Bryant,* 178 N. C., 702; *S. v. Rochelle,* 156 N. C., 641; *S. v. Freeman,* 100 N. C., 429; *S. v. Starnes,* 94 N. C., 973; *S. v. Reitz,* 83 N. C., 634. See, also, 12 Cyc., 619.

An alibi—meaning "elsewhere"—is not, properly speaking, a defense within any accurate meaning of the word "defense"; but it is a mere fact which may be used to call in question the identity of the person charged, or the entire basis of the prosecution. 8 R. C. L., 124 and 224.

In *Schultz v. Territory*, 5 Ariz., 239; 52 Pac., 352, the law upon the subject of an alibi seems to be very satisfactorily stated as follows: "The burden of proof never rests upon the accused to show his innocence, or to disprove the facts necessary to establish the crime with which he is charged. The defendant's presence at, and participation in, the *corpus delicti*, are affirmative material facts that the prosecution must show beyond a reasonable doubt to sustain a conviction. For the defendant to say he was not there is not an affirmative proposition; it is a denial of the existence of a material fact in the case. He meets the evidence of the prosecution by denying it. If a consideration of all the evidence in the case leaves a reasonable doubt of his presence, he must be acquitted."

I think the instruction, as given, was calculated to mislead, and in all probability did mislead, the jury. *S. v. Morgan*, 136 N. C., 628. The charge to the jury, in its different parts, should not be conflicting; and while a slightly inaccurate or incomplete instruction may be cured by subsequently supplying the defect or accurately stating the law, an erroneous placing of the burden of proof is not cured by a correct statement, widely separated from the excepted portion, and appearing elsewhere in the charge, unless the erroneous part is specifically withdrawn. *S. v. Falkner*, 182 N. C., 799, and cases there cited.

The rule as to the burden of proof is important and indispensable in the trial of causes. It constitutes a substantial right of the party upon whose adversary the burden rests, and hence it should be carefully guarded and rigidly enforced by the courts. *Hosiery Co. v. Express Co.*, 184 N. C., 480.

ADDENDUM.

Since writing the above, two concurring opinions have been prepared and filed herein. To my mind, what is said in these opinions tends to strengthen rather than to weaken the position that prejudicial error was committed on the trial of this cause.

It is contended that the objection to the testimony of A. G. Corpening is not properly presented. Why not? The defendant objected and excepted to the question propounded to the witness. He then objected and excepted to the admission of his evidence. To say that the exception cannot be sustained because the defendant has not assigned the correct reason therefor, in my opinion, is untenable. The appeal is not here in any limited sense. I do not understand it to be the rule with us that when objection is made to the admission of evidence, counsel must state the ground upon which the objection is based, unless requested to do so by the court. This may be the practice in other jurisdictions, but not so in North Carolina; at least, up to the present time the rule has been

otherwise. The crucial point is that Corpening failed to qualify as a character witness, in the face of objection, and this is a condition precedent to his right to testify under our decisions. It must follow, therefore, that his evidence is incompetent, and that the defendant has been erroneously convicted. The sufficiency of the form of the objection and the materiality of the evidence now in question were both presented and directly considered in *S. v. Mills,* 184 N. C., 694.

HOKE, J., concurs in dissent.

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RULES OF PRACTICE

IN THE

SUPREME COURT OF NORTH CAROLINA

Revised and Adopted Fall Term, 1923

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RULES

1. APPLICANTS FOR LICENSE TO PRACTICE LAW.

Applicants for license to practice law will be examined on the last Monday in January and Monday preceding the last Monday in August of each year, and at no other time. All examinations will be in writing.

2. COURSE OF STUDY PRESCRIBED FOR APPLICANTS FOR LICENSE TO PRACTICE LAW.

Each applicant must have attained the age of 21 years, or will arrive at that age before the time for the next examination, and must have studied:

Constitution of United States;
Constitution of North Carolina;
Creasy's English Constitution;
Sheppard's Constitutional Text-book;
Cooley's Principles of Constitutional Law;
Blackstone's Commentaries, as contained in vol. 1 of Ewell's Essentials of the Law;
Bispham's Equity;
Sharswood's Legal Ethics;
Consolidated Statutes N. C. (vol. 1).

Also some approved text-book on:

Agency,	Evidence,
Bailments,	Executors,
Carriers,	Negotiable Instruments,
Corporations,	Partnership,
Contracts,	Sales.

(1) *Requirements of Applicants for Law License.* Applicants must have studied the course prescribed for two years at least, and shall file with the clerk a certificate of good moral character signed by two members of the bar who are practicing attorneys of this Court, and also a certificate of the dean of a law school or a member of the bar of this Court, that the applicant has read law under his instruction, or to his knowledge or satisfaction, for two years, and upon examination by such instructor has been found competent and proficient in said course. Such certificate, while indispensable, will of course not be conclusive evidence of proficiency. An applicant from another State may file a certificate of good moral character signed by any State official of the State in which he resides. If the applicant has been licensed to practice law in another State, but is not entitled to be admitted in this State under Rule 3, based on the act of 1920, such applicant may file in lieu of the certificate of proficiency and time of study the law license which has been issued to him, with leave to withdraw the same after he

has been examined. The foregoing certificates as to character and proficiency, and also $23.50, must be deposited with the clerk not later than Friday noon preceding the day of examination. No formal application is required, but the applicant in filing his certificates, which may be done personally or by mail, must give the clerk the applicant's full name and permanent postoffice address. If the applicant shall fail to entitle himself to receive a license, $22 of the money deposited by him (the $20 required by the statute and $2 price of parchment) shall be returned to him, but the $1.50 registration fee required by the statute shall be retained by the clerk.

3. NONRESIDENT LAWYERS—WHEN ADMITTED.

Any person duly licensed to practice law in another state may be licensed to practice law in this State without examination, if attorneys who are licensed in this State may be licensed without examination in the state from which he comes, upon said applicant furnishing to the Supreme Court a certificate from a member of the court of last resort of such state that he is duly licensed to practice law therein, and that he has been actively engaged in the practice of law for five years or more, and is of good moral character and a proper person to be licensed to practice law, together with a certificate from two practicing attorneys of such state, practicing in said court of last resort, as to the applicant's good moral character, whose signatures shall be attested by the clerk of said Court, and upon said applicant satisfying the Court that he is a bona fide resident and citizen of North Carolina, or intends immediately to become such: *Provided further*, that said applicant shall be required to deposit with the clerk of the Supreme Court the same amount required of applicants who stand the examination. (Ch. 44, Public Laws, Extra Session 1920.)

And such nonresident lawyer must comply with all preliminary requirements of application for license not later than noon of Friday preceding the day of examination.

4. APPEALS—HOW DOCKETED.

Each appeal shall be docketed from the judicial district to which it properly belongs, and appeals in criminal cases from each district shall be placed at the head of the docket for the district. Appeals in both civil and criminal cases shall be docketed each in its own class, in the order in which they are filed with the clerk.

5. APPEALS—WHEN HEARD.

The transcript of the record on appeal from a judgment rendered before the commencement of a term of this Court must be docketed at such term seven days before entering upon the call of the docket of the

district to which it belongs, and stand for argument in its order; if not so docketed, the case shall be continued or dismissed under Rule 17, if the appellee files a proper certificate prior to the docketing of the transcript.

The transcript of the record on appeal from a court in a county in which the court shall be held during the term of this Court may be filed at such term or at the next succeeding term. If filed seven days before the Court begins the perusal of the docket of the district to which it belongs, it shall be heard in its order; otherwise, if a civil case, it shall be continued, unless by consent it is submitted upon printed argument under Rule 10.

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however,* that an appeal in a civil case from the First, Second, and Third districts which is tried between first day of January and the first Monday in February, or between first day of August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

6. APPEALS—CRIMINAL ACTIONS.

Appeals in criminal cases, docketed seven days before the call of the docket for their districts, shall be heard before the appeals in civil cases from said districts. Criminal appeals docketed after the time above stated shall be called immediately at the close of argument of appeals from the Twentieth District, unless for cause otherwise ordered, and shall have priority over civil cases placed at the end of the docket.

(1) *Appeal Bond.* If a justified appeal bond (except in pauper appeals) is not filed with the transcript, as required by sec. 647, Consolidated Statutes, the appeal will be dismissed.

(2) *Pauper Appeals.* See Rule 22.

(3) *When Appeal Abates.* See Rule 37.

(4) *Appeal Dismissed if Transcript Not Printed or Mimeographed.* See Rule 24.

7. CALL OF JUDICIAL DISTRICTS.

Appeals from the several districts will be called for hearing on Tuesday of the week to which the district is allotted, as follows:

From the First District, the first week of the term.

From the Second District, the second week of the term.

From the Third and Fourth districts, the third week of the term.

From the Fifth District, the fourth week of the term.

From the Sixth District, the fifth week of the term.

From the Seventh District, the sixth week of the term.

From the Eighth and Ninth districts, the seventh week of the term.

From the Tenth District, the eighth week of the term.

From the Eleventh District, the ninth week of the term.

From the Twelfth District, the tenth week of the term.

From the Thirteenth District, the eleventh week of the term.

From the Fourteenth District, the twelfth week of the term.

From the Fifteenth and Sixteenth districts, the thirteenth week of the term.

From the Seventeenth and Eighteenth districts, the fourteenth week of the term.

From the Nineteenth District, the fifteenth week of the term.

From the Twentieth District, the sixteenth week of the term.

Where two districts are allotted to one week, the cases will be docketed in the order in which they are received by the clerk, but the cases in the later district in number will not be called before Wednesday of said week, but cases from the later district in number must be docketed not later than Tuesday of the week preceding.

8. END OF DOCKET.

At the Spring Term, causes not reached and disposed of during the period allotted to each district, and those for any other cause put to the foot of the docket, shall be called at the close of argument of appeals from the Twentieth District, and each cause, in its order, tried or continued, subject to Rule 6.

At the Fall Term, appeals in criminal cases only will be heard at the end of the docket, unless the Court for special reason shall set a civil appeal to be heard at the end of the docket at that term. At either term the Court in its discretion may place cases not reached on the call of a district at the end of some other district.

9. CALL OF DOCKET.

Each appeal shall be called in its proper order. If any party shall not be ready, the cause, if a civil action, may be put to the foot of the district, by the consent of the counsel appearing, or for cause shown, and be again called when reached, if the docket shall be called a second time; otherwise, the first call shall be peremptory; or at the first term of the Court in the year a cause may, by consent of the Court, be put to the foot of the docket; if no counsel appear for either party at the first call, it will be put to the end of the district, unless a printed brief is filed by one of the parties; and if none appear at the second call, it will be continued, unless the Court shall otherwise direct. Appeals in criminal actions will be called peremptorily for argument on the first call of the docket, unless for good cause assigned.

10. SUBMISSION ON PRINTED ARGUMENTS.

By consent of counsel, any case may be submitted without oral argument, upon printed briefs by both sides, without regard to the number of the case on the docket, or date of docketing the appeal. Such consent must be signed by counsel of both parties and filed, and the clerk shall make a note thereof on the docket; but the Court, notwithstanding, may direct an oral argument to be made, if it shall deem best.

An appeal submitted under this rule must be docketed before the call of appeals from the Nineteenth District has been entered upon, unless it appears to the Court from the record that there has been no delay in docketing the appeal, and that it has been docketed as soon as practicable, and that public interest requires a speedy hearing of the case.

11. BRIEFS NOT RECEIVED AFTER ARGUMENT.

When the case is argued orally on the regular call of the docket, in behalf of only one of the parties, no printed argument for the other party will be received, unless it is filed before the oral argument begins. No brief or argument will be received after a case has been argued or submitted, except upon leave granted in open court, after notice to opposing counsel.

12. BRIEFS REGARDED AS PERSONAL APPEARANCE.

When a case is reached on the regular call of the docket, and a printed brief or argument shall be filed for either party, the case shall stand on the same footing as if there were a personal appearance by counsel.

13. WHEN CASE MAY BE HEARD OUT OF ORDER.

In cases where the State is concerned, involving or affecting some matter of general public interest, the Court may, upon motion of the Attorney-General, assign an earlier place on the calendar, or fix a day for the argument thereof, which shall take precedence of other business. And the Court, at the instance of a party to a cause that directly involves the right to a public office, or at the instance of a party arrested in a civil action who is in jail by reason of inability to give bond or from refusal of the court to discharge him, or in other cases of sufficient importance, in its judgment, may make the like assignment in respect to it.

14. WHEN CASES MAY BE HEARD TOGETHER.

Two or more cases involving the same question may, by order of the Court, be heard together, but they must be argued as one case, the Court directing, when the counsel disagree, the course of argument.

15. APPEAL DISMISSED IF NOT PROSECUTED.

Cases not prosecuted for two terms shall, when reached in order at the third term, be dismissed at the cost of appellant, unless the same, for sufficient cause, shall be continued. When so dismissed, the appellant may, at any time thereafter, not later than during the week allotted to the district to which it belongs at the next succeeding term, move to have the same reinstated, on notice to the appellee and showing sufficient cause.

16. MOTION TO DISMISS APPEAL—WHEN MADE.

A motion to dismiss an appeal for noncompliance with the requirements of the statute in perfecting an appeal must be made at or before entering upon the trial of the appeal upon its merits, and such motion will be allowed unless such compliance be shown in the record, or a waiver thereof appear therein, or such compliance is dispensed with by a writing signed by the appellee or his counsel, to that effect, or unless the Court shall allow appropriate amendments.

17. APPEAL DISMISSED FOR FAILURE TO DOCKET IN TIME.

If the appellant in a civil action shall fail to bring up and file a transcript of the record seven days before the Court begins the call of cases from the district from which it comes at the term of this Court at which such transcript is required to be filed, the appellee may file with the clerk of this Court the certificate of the clerk of the court from which the appeal comes, showing the names of the parties thereto, the time when the judgment and appeal were taken, the name of the appellant, and the date of the settling of the case on appeal, if any has been settled, with his motion to docket and dismiss at appellant's cost said appeal, which motion shall be allowed at the first session of the Court thereafter, with leave to the appellant, during the term, and after notice to the appellee, to apply for the redocketing of the cause: *Provided*, that such motion of appellee to docket and dismiss the appeal will not be considered unless the appellee, before making the motion to dismiss, has paid the clerk of this Court the fee charged by the statute for docketing an appeal, the fee for drawing and entering judgment, and the determination fee, execution for such amount to issue in favor of appellee against appellant.

(1) *Appeal Docketed by Appellee When Frivolous and Taken for Purposes of Delay.* The transcript of an appeal which is obviously frivolous and appears to have been taken only for purposes of delay, may be docketed in this Court by appellee before the time required by Rule 5, and if it appears to the Court that the appellee's contention is correct, the appeal will be dismissed at cost of appellant.

18. APPEAL DOCKETED AND DISMISSED NOT TO BE REINSTATED UNTIL APPELLANT HAS PAID COSTS.

When an appeal is dismissed by reason of the failure of the appellant to bring up a transcript of the record, and the same, or a certificate for that purpose, as allowed by Rule 17, is procured by appellee, and the case dismissed, no order shall be made setting aside the dismissal or allowing the appeal to be reinstated, even though the appellant may be otherwise entitled to such order, until the appellant shall have paid or offered to pay the costs of the appellee in procuring the certificate and in causing the same to be docketed.

19. TRANSCRIPTS.

(1) *What to Contain and How Arranged.* In every transcript record of an action brought to this Court, the proceedings shall be set forth in the order of time in which they occurred, and the several processes, orders, and every document constituting the transcript shall be identified by a proper title or heading, and shall be arranged to follow each other in the order the same took place, when practicable. The pages shall be numbered, and on the front page of the record there shall be an index in the following or some equivalent form:

	PAGE
Summons—date	1
Complaint—first cause of action	2
Complaint—second cause of action	3
Affidavit for attachment, etc.	4

It shall not be necessary to send as a part of the transcript, affidavits, orders, and other process and proceedings in the action not involved in the appeal and not necessary to an understanding of the exceptions relied on. Counsel may sign an agreement which shall be made a part of the record as to the parts to be transcribed, and in the event of disagreement of counsel the judge of the Superior Court shall designate the same by written order: *Provided,* that the pleadings on which the case is tried, the issues, and the judgment appealed from shall be a part of the transcript in all cases: *Provided further,* that this rule is subject to the power of this Court to order additional papers and parts of the record to be sent up.

(2) *Two Appeals.* When there are two or more appeals in one action it shall not be necessary to have more than one transcript, but the statements of cases on appeal shall be settled as now required by law, and shall appear separately in the transcript. The judge of the Superior Court shall determine the part of the costs of making the transcript to be paid by each party, subject to the right to recover such costs in the final judgment as now provided by law.

(3) *Exceptions Grouped.* All exceptions relied on shall be grouped and separately numbered immediately before or after the signature to the case on appeal. Exceptions not thus set out will be deemed to be abandoned. If this rule is not complied with, and the appeal is not from a judgment of nonsuit, it will be dismissed, or the Court will in its discretion refer the transcript to the clerk or to some attorney to state the exceptions according to this rule, for which an allowance of not less than $5 will be made, to be paid in advance by the appellant; but the transcript will not be so referred or remanded unless the appellant file with the clerk a written stipulation that the appeal shall be heard and determined on printed briefs under Rule 10, if the appellee shall so elect.

(4) *Evidence to be Stated in Narrative Form.* The evidence in case on appeal shall be in narrative form, and not by question and answer, except that a question and answer, or a series of them, may be set out when the subject of a particular exception. When this rule is not complied with, and the case on appeal is settled by the judge, this Court will in its discretion hear the appeal, or remand for a settlement of the case to conform to this rule. If the case is settled by agreement of counsel, or the statement of the appellant is the case on appeal, and the rule is not complied with, or the appeal is from a judgment of nonsuit, the appeal will be dismissed. In other cases the Court will in its discretion dismiss the appeal, or remand for a settlement of the case on appeal.

(5) *Unnecessary Portions of Transcript—How Taxed.* The cost of copying and printing unnecessary and irrelevant testimony, or any other matter not needed to explain the exceptions or errors assigned, and not constituting a part of the record proper, shall in all cases be charged to the appellant, unless it appears that they were sent up at the instance of the appellee, in which case the cost shall be taxed against him.

(6) *Transcripts in Pauper Appeals.* See Rule 22.

(7) *Maps.* Seven copies of every map or diagram which is a part of the transcript of appeal, and which is applicable to the merits of the appeal, shall be filed with the clerk of this Court before such appeal is called for argument.

(8) *Appeal Bond.* See Rule 6 (1).

(9) The prosecution bond given in every case shall be sent up with the transcript of the record. Such bond shall be justified and the justification shall name the county wherein the surety resides.

(10) *Insufficient Transcript.* If a transcript has not been properly arranged, as required by subsection (1) of this rule, the appeal shall be dismissed or referred to the clerk to be properly arranged, for which an allowance of $5 shall be made to him. If the appeal is not dismissed, and is so referred to the clerk, it shall be placed for hearing at the end of

the district, or the end of the docket, or continued as the Court may deem proper.

20. PLEADINGS.

(1) *When Deemed Frivolous.* Memoranda of pleadings will not be received or recognized in the Supreme Court as pleadings, even by consent of counsel, but the same will be treated as frivolous and impertinent.

(2) *When Containing More Than One Cause of Action.* Every pleading containing two or more causes of action shall, in each, set out all the facts upon which it rests, and shall not, by reference to others, incorporate in itself any of the allegations in them, except that exhibits, by marks or numbers, may be referred to without reciting their contents, when attached thereto.

(3) *When Scandalous.* Pleadings containing scandalous or impertinent matter will, in a plain case, be ordered by the Court to be stricken from the record, or reformed; and for this purpose the Court may refer it to the clerk, or some member of the bar, to examine and report the character of the same.

(4) *Amendments.* The Court may amend any process, pleading, or proceeding, either in form or substance, for the purpose of furthering justice, on such terms as shall be deemed just, at any time before final judgment, or may make proper parties to any case, where the Court may deem it necessary and proper for the purpose of justice, and on such terms as the Court may prescribe.

21. EXCEPTIONS. (See, also, Rule 19 (3).

Every appellant shall set out in his statement of case served on appeal his exceptions to the proceedings, ruling, or judgment of the court, briefly and clearly stated and numbered. When no case settled is necessary, then, within ten days next after the end of the term at which the judgment is rendered from which an appeal shall be taken, or, in case of a ruling of the court at chambers and not in term-time, within ten days after notice thereof, appellant shall file the said exceptions in the office of the clerk of the court below. No exception not thus set out, or filed and made a part of the case or record, shall be considered by this Court, other than exceptions to the jurisdiction, or because the complaint does not state a cause of action, or motions in arrest for the insufficiency of an indictment. When testimony is admitted, not as substantive evidence, but in corroboration or contradiction, and that fact is stated by the court when it is admitted, it will not be ground for exception that the judge fails in his charge to again instruct the jury specially upon the nature of such evidence, unless his attention is called to the matter by a prayer for instruction; nor will it be ground of exception that evidence compe-

tent for some purposes but not for all, is admitted generally, unless the appellant asks, at the time of admission, that its purpose shall be restricted.

22. PRINTING TRANSCRIPTS. (But see Rule 25.)

Twenty-five copies of the transcript in every case docketed, except in pauper appeals, shall be printed and filed immediately after the case has been docketed, unless printed before the case has been docketed, in which event the printed copies shall be filed when the case is docketed. It shall not be necessary to print the summons and other papers showing service of process, if a statement signed by counsel is printed giving the names of all the parties and stating that summons has been duly served. Nor shall it be necessary to print formal parts of the record showing the organization of the court, the constitution of the jury, etc.

In pauper appeals the counsel for appellant may file seven typewritten copies of his brief, in lieu of printed copies, if he so elects, and such briefs must give a succinct statement of the facts applicable to the exceptions and the authorities relied on, and in pauper appeals the appellant may also file, in lieu of printed copies, if he so elects, seven typewritten copies of the transcript, in addition to the original transcript. Should the appellant gain the appeal, the cost of preparing the typewritten briefs or transcripts shall be taxed against the appellee, provided statement of such cost is given the clerk of this Court before the case is decided. The arrangement of the matter in the printed transcript shall follow the order prescribed by Rule 19.

23. HOW PRINTED.

The transcript on appeal shall be printed under the direction of the clerk of this Court, and in the same type and style, and pages of same size as the reports of this Court, unless it is printed before the appeal is docketed in the required style and manner. If it is to be printed here the appellant or the party sending up the appeal shall send therewith to the clerk of this Court a cash deposit, sufficient to cover the cost of printing, which shall include 10 cents per page for the clerk of this Court, to recompense him for his services in preparing the transcript in proper shape for the printer.

When it appears that the clerk has waived the requirement of a cash deposit by appellant to cover estimated cost of printing, and the cost of printing has not been paid when the case is called for argument, the Court will in its discretion, on motion of counsel for appellee or a statement by the clerk, dismiss the appeal.

24. APPEAL DISMISSED IF TRANSCRIPT NOT PRINTED.

If the transcript on appeal (except in pauper appeals) shall not be printed or mimeographed as required by the rules, by reason of the

failure of the appellant to send up the transcript or deposit the cost therefor in time for it to be printed, when called in its regular order (as set out in Rule 5), the appeal shall, on motion of appellee, be dismissed; but the Court may, on motion of appellant, after five days notice, at the same term, for good cause shown, reinstate the appeal, to be heard at the next term. When a cause is called and the record is not fully printed, if the appellee does not move to dismiss, the cause will be continued. The Court will hear no cause in which the rule as to printing is not complied with, other than pauper appeals.

25. MIMEOGRAPHED RECORDS AND BRIEFS.

Counsel may file in lieu of printed records and briefs 25 mimeographed copies thereof, to be prepared under the immediate supervision and direction of the clerk of this Court, the cost of such copies not to exceed $1.10 per page of an average of 40 lines and 400 words to the page: *Provided, however,* that it shall be permissible and optional with counsel to file printed transcripts and briefs when it is possible to print such documents without unnecessary delay and inconvenience to the Court and appellee's counsel, and within time for an appeal to be heard in its regular order under Rule 5.

The clerk of this Court is required to purchase the stencil sheets, arrange all matter to be mimeographed for the operator, to supervise the work, to carefully read the proof, and to index the mimeographed transcripts and mail copies promptly to counsel. A cash deposit covering estimated cost of this work is required as in Rule 23 under the same penalty as therein prescribed for failure to pay the account due for such work.

26. COST OF PRINTING AND MIMEOGRAPHING TRANSCRIPTS AND BRIEFS TO BE RECOVERED.

The actual cost of printing the transcript of appeal and of the brief shall be allowed the successful litigant, not to exceed $1.50 per page, and not exceeding sixty pages for a transcript and twenty pages for a brief, unless otherwise specially ordered by the Court, and he shall be allowed 10 cents additional for each such page paid to the clerk of this Court for making copy for the printer, unless the transcript was printed before the case was docketed.

Judge and counsel should not encumber the "case on appeal" with evidence or with matters not pertinent to the exceptions taken. When the case is settled, either by the judge or the parties, if either party deems that unnecessary matter is incorporated, he shall have his exception noted, designating the parts deemed unnecessary, and if, upon hearing the appeal, the Court finds that such parts were in fact unnecessary, the cost of making the transcript of such unnecessary matter and of

printing the same shall be taxed against the party at whose instance it was incorporated into the transcript, as required by Rule 22, no matter in whose favor the judgment is given here, except when such party has already paid the expense of such unnecessary matter, and in that event he shall not recover it back, though successful on his appeal. Motions for taxation of costs for copying and printing unnecessary parts sent up in the manuscript shall be decided without argument.

A successful litigant shall recover the actual cost of mimeographing a transcript or brief, not to exceed sixty pages of a transcript and twenty pages of a brief, unless otherwise ordered as herein provided in this rule.

27. Briefs.

Twenty-five printed or mimeographed copies of briefs of both parties shall be filed in all cases (except in pauper appeals, as provided in Rule 22). Such briefs may be sent up by counsel ready printed, or they may be printed or mimeographed under the supervision of the clerk of this Court if a proper deposit for cost is made, as specified in Rule 23. They must be of the size and style prescribed by such rule. The briefs are expected to cover all the points presented in the oral argument, though additional authority may be cited if discovered after brief is filed.

28. Appellant's Brief.

The brief of appellant shall set forth a succinct statement of the facts necessary for understanding the exceptions, except as to an exception that there was no evidence, it shall be sufficient to refer to pages of printed transcript containing the evidence. Such brief shall contain, properly numbered, the several grounds of exception and assignments of error with reference to printed pages of transcript, and the authorities relied on classified under each assignment; and if statutes are material, the same shall be cited by the book, chapter, and section. Exceptions in the record not set out in appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned by him. Such briefs when filed shall be noted by the clerk on the docket, and a copy thereof furnished by him to opposite counsel on application.

Appellant shall, upon delivering a copy of his manuscript brief to the printer to be printed or to the clerk of this Court to be printed or mimeographed, immediately mail or deliver to appellee's counsel a carbon typewritten copy thereof. If the printed or mimeographed copies of appellant's brief have not been filed with the clerk of this Court, and no typewritten copy has been delivered to appellee's counsel by 12 o'clock noon on Tuesday of the week preceding the call of the district to which the case belongs, the appeal will be dismissed on motion of appellee, when

the call of that district is begun, unless for good cause shown the Court shall give further time to print the brief.

29. APPELLEE'S BRIEF.

The appellee shall file 25 printed or mimeographed briefs with the clerk of this Court by noon of Saturday preceding the call of the district to which the case belongs and the same shall be noted by the clerk on his docket and a copy furnished by the clerk, on application, to counsel for appellant. It is not required that the appellee's brief shall contain a statement of the case. On failure of the appellee to file his brief by the time required, the cause will be heard and determined without argument from appellee unless for good cause shown the Court shall give appellee further time to file his brief.

30. ARGUMENTS.

(1) The counsel for the appellant shall be entitled to open and conclude the argument.

(2) Counsel for appellant may be heard ten minutes for statement of case and thirty minutes in argument.

(3) Counsel for appellee may be heard for thirty minutes.

(4) The time for argument may be extended by the Court in a case requiring such extension, but application for extension must be made before the argument begins. The Court, however, may direct the argument of such points as it may see fit outside of the time limited.

(5) Any number of counsel may be heard on either side within the limit of the time above specified; but if several counsel shall be heard, each must confine himself to a part or parts of the subject-matter involved in the exceptions not discussed by his associate counsel, unless directed otherwise by the Court, so as to avoid tedious and useless repetition.

31. REARGUMENTS.

The Court will, of its own motion, direct a reargument before deciding any case, if in its judgment it is desirable.

32. AGREEMENTS OF COUNSEL.

The Court will not recognize any agreement of counsel in any case unless the same shall appear in the record, or in writing, filed in the cause in this Court.

33. APPEARANCES.

An attorney shall not be recognized as appearing in any case unless he be entered as counsel of record in the case. Upon his request, the clerk shall enter the name of such attorney, or he may enter it himself, thereby making him counsel of record for the party he may designate therein.

Such appearance of counsel shall be deemed to be general in the case, unless a different appearance be indicated. Counsel of record are not permitted to withdraw from a case, except by leave of the Court.

34. CERTIORARI.

(1) *When Applied For.* Generally, the writ of *certiorari*, as a substitute for an appeal, must be applied for at the term of this Court to which the appeal ought to have been taken, or, if no appeal lay, then before or to the term of this Court next after the judgment complained of was entered in the Superior Court. If the writ shall be applied for after that term, sufficient cause for the delay must be shown.

(2) *How Applied For.* The writs of *certiorari* and *supersedeas* shall be granted only upon petition, specifying the grounds of application therefor, except when a diminution of the record shall be suggested and it appears upon the face of the record that it is manifestly defective, in which case the writ of *certiorari* may be allowed, upon motion in writing. In all other cases the adverse party may answer the petition. The petition and answer must be verified, and the application shall be heard upon the petition, answer, affidavit, and such other evidence as may be pertinent.

(3) *Notice of.* No such petition or motion in the application shall be heard unless the petitioner shall have given the adverse party ten days notice, in writing, of the same; but the Court may, for just cause shown, shorten the time for such notice.

35. ADDITIONAL ISSUES.

If, pending the consideration of an appeal, the Supreme Court shall consider the trial of one or more issues of fact necessary to a proper decision of the case upon its merits, such issues shall be made up under the direction of the Court and certified to the Superior Court for trial, and the case will be retained for that purpose.

36. MOTIONS.

All motions made to the Court must be reduced to writing, and shall contain a brief statement of the facts on which they are founded, and the purpose of the same. Such motions, not leading to debate nor followed by voluminous evidence, may be made at the opening of the session of the Court.

37. ABATEMENT AND REVIVOR.

Whenever, pending an appeal to this Court, either party shall die, the proper representative in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in, and, on motion, be admitted to become parties to the action, and thereupon the

appeal shall be heard and determined as in other causes; and if such representatives shall not so voluntarily become parties, then the opposing party may suggest the death upon the record, and thereupon, on motion, obtain an order that, unless such representatives shall become parties within the first five days of the ensuing term, the party moving for such order shall be entitled to have the appeal dismissed; or, if the party moving shall be the appellant, he shall be entitled to have the appeal heard and determined according to the course of the Court: *Provided,* such order shall be served upon the opposing party.

When the death of a party is suggested, and the proper representatives of the deceased fail to appear by the fifth day of the term next succeeding such suggestion, and no action shall be taken by the opposing party within the time to compel their appearance, the appeal shall abate, unless otherwise ordered.

38. CERTIFICATION OF DECISIONS.

The clerk shall, on the first Monday in each month, transmit, by some safe hand, or by mail, to the clerks of the Superior Courts, certificates of the decisions of the Supreme Court which shall have been on file ten days, in cases sent from said court. Con. Stats., sec. 1417. But the Court in its discretion may order an opinion certified down at an earlier day. Upon final adjournment of the Court, the clerk shall at once certify to the Superior Courts all of the decisions not theretofore certified.

39. JUDGMENT AND MINUTE DOCKETS.

The judgment docket of this Court shall contain an alphabetical index of the names of the parties in favor of whom and against whom any judgment for costs or judgment interlocutory or upon the merits is entered. On this docket the clerk of the Court will enter a brief memorandum of every final judgment affecting the right to real property, and of every judgment requiring, in whole or in part, the payment of money, stating the names of the parties, the term at which such judgment was entered, its number on the docket of the Court; and when it shall appear from the return on the execution, or from an order for an entry of satisfaction by this Court, that the judgment has been satisfied, in whole or in part, the clerk, at the request of any one interested in such entry, and on the payment of the lawful fee, shall make a memorandum of such satisfaction, whether in whole or in part, and refer briefly to the evidence of it.

The clerk shall keep a Permanent Minute-Book, containing a brief summary of the proceedings of this Court in each appeal disposed of.

40. CLERK AND COMMISSIONERS.

The clerk and every commissioner of this Court who, by virtue or under color of any order, judgment, or decree of the Supreme Court in any action or matter pending therein, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action or matter, or of any other person, shall, at the term of said Court held next after the first day of January in each year, report to the Court a statement of said fund, setting forth the title and number of the action or matter, the term of the Court at which the order or orders under which the clerk or such commissioner professes to act was made, the amount and character of the investment, and the security for same, and his opinion as to the sufficiency of such security. In every subsequent report he shall state the condition of the fund and any change made in the amount or character of the investment, and every payment made to any person entitled thereto.

The reports required by the preceding paragraph shall be examined by the Court or some member thereof, and their or his approval indorsed shall be recorded in a well bound book, kept for the purpose, in the office of the clerk of the Supreme Court, entitled "Record of Funds," and the cost of recording the same shall be allowed by the Court and paid out of the fund. The report shall be filed among the papers of the action or matter to which the fund belongs.

41. LIBRARIAN.

(1) *Reports by Him.* The Librarian shall keep a correct catalogue of all books, periodicals, and pamphlets in the Library of the Supreme Court, and report to the Court on the first day of the Spring Term of each year what books have been added to the Library during the year next preceding his report, by purchase or otherwise, and also what books have been lost or disposed of, and in what manner.

(2) *Books Taken Out.* No book belonging to the Supreme Court Library shall be taken therefrom, except in the Supreme Court chamber, unless by the Justices of the Court, the Governor, the Attorney-General, or the head of some department of the executive branch of the State Government, without the special permission of the Marshal of the Court, and then only upon the application in writing of a judge of a Superior Court holding court or hearing some matter in the city of Raleigh, the President of the Senate, the Speaker of the House of Representatives, or the chairman of the several committees of the General Assembly; and in such cases the Marshal shall enter in a book kept for the purpose the name of the officer requiring the same, the name and number of the volume taken, when taken, and when returned.

42. COURT'S OPINIONS.

After the Court has decided a cause, the judge assigned to write it shall hand the opinion, when written, to the clerk, who shall cause five typewritten copies to be at once made and a copy sent in a sealed envelope to each member of the Court, to the end that the same may be carefully examined, and the bearing of the authority cited may be considered prior to the day when the opinion shall be finally offered for adoption by the Court and ordered to be filed.

43. EXECUTIONS.

(1) *Teste of Executions.* When an appeal shall be taken after the commencement of a term of this Court, the judgment and teste of the execution shall have effect from the time of the filing of the appeal.

(2) *Issuing and Return of.* Executions issuing from this Court may be directed to the proper officers of any county in the State. At the request of a party in whose favor execution is to be issued, it may be made returnable on any specified day after the commencement of the term of this Court next ensuing its teste. In the absence of such request, the Clerk shall, within thirty days after the certificate of opinion is sent down, issue such execution to the county from which the cause came, making it returnable on the first day of the next ensuing term. The execution may, when the party in whose favor judgment is rendered shall so direct, be made returnable to the term of the Superior Court of said county held next after the date of its issue, and thereafter successive executions will only be issued from said Superior Court, and when satisfied, the fact shall be certified to this Court, to the end that an entry to this effect be made here.

Executions for the costs of this Court, adjudged against the losing party to appeals, may be issued after the determination of the appeal, returnable to a subsequent day of the term; or they may be issued after the end of the term, returnable, on a day named, at the next succeeding term of this Court.

The officer to whom said executions are directed shall be amenable to the penalties prescribed by law for failure to make due and proper return thereof.

44. PETITION TO REHEAR.

(1) *When Filed.* Petitions to rehear must be filed within forty days after the filing of the opinion in the case. No communication with the Court, or any Justice thereof, in regard to any such petition, will be permitted under any circumstances. No oral argument or other presentation of the cause to the Court, or any Justice thereof, by either party, will be allowed, unless on special request the Court shall so order.

(2) *What to Contain.* The petition must assign the alleged error of law complained of, or the matter overlooked, or the newly discovered evidence; and allege that the judgment complained of has been performed or secured. Such petition shall be accompanied with the certificate of at least two members of the bar of this Court, who have no interest in the subject-matter and have never been of counsel for either party to the suit, and each of whom shall have been at least five years a member of the bar of this Court, that they have carefully examined the case and the law bearing thereon and the authorities cited in the opinion, and they shall summarize succinctly in such certificate the points in which they deem the opinion erroneous.

(3) *Two Copies to be Filed, How Endorsed.* The petitioner shall endorse upon the petition, of which he shall file two copies, the names of the two Justices, neither of whom dissented from the opinion, to whom the petition shall be referred by the clerk, and it shall not be docketed for rehearing unless both of said Justices endorse thereon that it is a proper case to be reheard: *Provided, however*, that when there have been two dissenting Justices, it shall be sufficient for the petitioner to file only one copy of the petition and designate only one Justice, and his approval in such case shall be sufficient to order the petition docketed.

The clerk shall, upon the receipt of a petition to rehear, immediately deliver a copy to each of the Justices to whom it is to be referred, unless the petition is received during a vacation of the Court, in which event it shall be delivered to the Justice designated by the petitioner on the first day of the next succeeding term of Court.

(4) *Justices to Act in Thirty Days.* The clerk shall enter upon the rehearing docket and upon the petition the date when the petition is filed in the clerk's office, the names of the Justices to whom the petitioner has requested that the petition be referred, and also the date when the petition is delivered to each of the Justices. The Justices will act upon the petition within thirty days after it is delivered to them, and the clerk is directed to report in writing to the Court in conference all petitions to rehear not acted on within the time required.

(5) *New Briefs to be Filed.* There shall be no oral argument before the Justices or Justice thus designated, before it is acted on by them, and if they order the petition docketed, there shall be no oral argument thereon before the Court (unless the Court of its own motion shall direct an oral argument), but it shall be submitted on the record at the former hearing the printed petition to rehear, and a brief to be filed by the petitioner within ten days after the petition is ordered to be docketed, and a brief to be filed by the respondent within twenty days after such order to docket. Such briefs shall not be the briefs on the first hearing, but

shall be new briefs, directed to the errors assigned in the petition, and shall be printed. If not printed and filed in the prescribed time by the petitioner, the petition will be dismissed, and for default in either particular by the respondent the cause will be disposed of without such brief.

(6) *When Petition Docketed for Rehearing.* The petition may be ordered docketed for a rehearing as to all points recited by the two certifying counsel (who cannot certify to errors not alleged in the petition), or it may be restricted to one or more of the points thus certified, as may be directed by the Justices who grant the application. When a petition to rehear is ordered to be docketed, notice shall at once be given by the clerk to counsel on both sides.

(7) *Stay of Execution.* When a petition to rehear is filed with the clerk of this Court, the Justice or Justices designated by the petitioner to pass upon it may, upon application and in his or their discretion, stay or restrain execution of the judgment or order until the certificate for a rehearing is either refused or, if allowed, until this Court has finally disposed of the case on the rehearing. Unless the party applying for the rehearing has already stayed execution in the court below, when the appeal was taken, by giving the required security, he shall, at the time of applying to the Justice or Justices for a stay, tender sufficient security for that purpose, which shall be approved by the Justice or Justices. Notice of the application for a stay must be given to the other party, if deemed proper by the Justice or Justices, for such time before the hearing of the application and in such manner as may be ordered. If a petition for a rehearing is denied, or if granted, and the petition is afterwards dismissed, the stay shall no longer continue in force, and execution may issue at once, or the judgment or order be otherwise enforced, unless, in case the petition is dismissed, the Court shall otherwise direct. When a stay is granted, the order shall run in the name of this Court and be signed and issued by the clerk, under its seal, with proper recitals to show the authority under which it was issued.

45. SITTINGS OF THE COURT.

The Court will sit daily, during the terms, Sundays and Mondays excepted, from 10 a. m. to 2 p. m., for the hearing of causes, except when the docket of a district is exhausted before the close of the week allotted to it. The Court will sit, however, on the first Monday of each term for the examination of applicants for license to practice law. (But see Rule 1.)

46. CITATION OF REPORTS.

Inasmuch as all the volumes of Reports prior to the 63d have been reprinted by the State, with the number of the volume instead of the name of the reporter, counsel will cite the volumes prior to 63 N. C. as follows:

1 and 2 Martin, Taylor & Conf.	as	1	N. C.
1 Haywood	"	2	"
2 "	"	3	"
1 and 2 Car. Law Repository & N.C. Term	"	4	"
1 Murphey	"	5	"
2 "	"	6	"
3 "	"	7	"
1 Hawks	"	8	"
2 "	"	9	"
3 "	"	10	"
4 "	"	11	"
1 Devereux Law	"	12	"
2 " "	"	13	"
3 " "	"	14	"
4 " "	"	15	"
1 " Eq.	"	16	"
2 " "	"	17	"
1 Dev. & Bat. Law	"	18	"
2 " "	"	19	"
3 & 4 " "	"	20	"
1 Dev. & Bat. Eq.	"	21	"
2 " "	"	22	"
1 Iredell Law	"	23	"
2 " "	"	24	"
3 " "	"	25	"
4 " "	"	26	"
5 " "	"	27	"
6 " "	"	28	"
7 " "	"	29	"
8 " "	"	30	"
9 Iredell Law	as	31	N. C.
10 " "	"	32	"
11 " "	"	33	"
12 " "	"	34	"
13 " "	"	35	"
1 " Eq.	"	36	"
2 " "	"	37	"
3 " "	"	38	"
4 " "	"	39	"
5 " "	"	40	"
6 " "	"	41	"
7 " "	"	42	"
8 " "	"	43	"
Busbee Law	"	44	"
" Eq.	"	45	"
1 Jones Law	"	46	"
2 " "	"	47	"
3 " "	"	48	"
4 " "	"	49	"
5 " "	"	50	"
6 " "	"	51	"
7 " "	"	52	"
8 " "	"	53	"
1 " Eq.	"	54	"
2 " "	"	55	"
3 " "	"	56	"
4 " "	"	57	"
5 " "	"	58	"
6 " "	"	59	"
1 and 2 Winston	"	60	"
Phillips Law	"	61	"
" Eq.	"	62	"

In quoting from the *reprinted* Reports counsel will cite always the marginal (*i. e.*, the *original*) paging, except 1 N. C. and 20 N. C., which are repaged throughout, without marginal paging.

47. COURT RECONVENED.

The Court may be reconvened at any time after final adjournment by order of the Chief Justice, or, in the event of his inability to act, by one of the Associate Justices in order of seniority.

RULES OF PRACTICE

IN THE

NORTH CAROLINA SUPERIOR COURTS

Revised and Adopted by the Justices of the Supreme Court

RULES

Amendment to Rule 5 of the Supreme Court:

Upon motion, it is ordered unanimously by the Court, that paragraph three of Rule 5 be amended as follows:

Appeals in criminal cases shall each be heard at the term at which they are docketed, unless for cause or by consent they are continued: *Provided, however*, that an appeal in a civil case from the First, Second, Third and Fourth districts which is tried between first day of January and the first Monday in February, or between first day of August and fourth Monday in August, is not required to be docketed at the immediately succeeding term of this Court, though if docketed in time for hearing at said first term, the appeal will stand regularly for argument.

The effect of this amendment is to include the Fourth District.

For the Court: CLARKSON, J.

21 August 1923.

the amount of the bond, and the ju-

is a resident of North Carolina, and must also show the county wherein the surety resides.

3. OPENING AND CONCLUSION.

In all cases, civil or criminal, when no evidence is introduced by the defendant, the right of reply and conclusion shall belong to his counsel.

4. EXAMINATION OF WITNESSES.

When several are employed on the same side, the examination, or cross-examination, of each witness shall be conducted by one counsel, but the counsel may change with each successive witness, or, with leave of the court, in a prolonged examination of a single witness. When a witness is sworn and offered, or when testimony is proposed to be elicited, to which objection is made by counsel of the opposing party, the counsel so offering shall state for what purpose the witness, or the evidence to be elicited, is offered; whereupon the counsel objecting shall state his objection and be heard in support thereof, and the counsel so offering shall be

heard in support of the competency of the witness and of the proposed evidence in conclusion, and the argument shall proceed no further, unless by special leave of the court.

5. Motion for Continuance.

When a party in a civil suit moves for a continuance on account of absent testimony, such party shall state, in a written affidavit, the nature of such testimony and what he expects to prove by it, and the motion shall be decided without debate, unless permitted by the court.

6. Decision of Right to Conclude Not Appealable.

In any case where a question shall arise as to whether the counsel for the plaintiff or the counsel for the defendant shall have the reply and the conclusion of the argument the court shall decide who is so entitled, and, except in the cases mentioned in Rule 3, its decision shall be final and not reviewable.

7. Issues.

Issues shall be made up as provided and directed in the Con. Stats., sec. 584.

8. Judgments.

Judgments shall be docketed as provided and directed in Con. Stats., secs. 613 and 614.

9. Transcript of Judgment.

Clerks of the Superior Courts shall not make out transcripts of the original judgment docket to be docketed in another county, until after the expiration of the term of the court at which such judgments were rendered.

10. Docketing Magistrate's Judgments.

Judgments rendered by a justice of the peace upon summons issued and returnable on the same day as the cases are successively reached and passed on, without continuance as to any, shall stand upon the same footing, and transcripts for docketing in the Superior Court shall be furnished to applicants at the same time after such rendition of judgment, and if delivered to the clerk of such court on the same day, shall create liens on real estate, and have no priority or precedence the one over the other, if all are, or shall be, entered within ten days after such delivery to said clerk.

11. Transcript to Supreme Court.

In every case of appeal to the Supreme Court, or in which a case is taken to the Supreme Court by means of the writ of *certiorari* as a sub-

stitute for an appeal, it shall be the duty of the clerk of the Superior Court, in preparing the transcript of the record for the Supreme Court, to set forth the proceedings in the action in the order of time in which they occurred, and the several processes or orders, and they shall be arranged to follow each other in order as nearly as practicable.

The pages of the transcript shall be plainly numbered, and there shall be written on the margin of each a brief statement of the subject-matter, opposite to the same. On the first page of the transcript of the record there shall be an index in the following or some equivalent form:

PAGE

Summons—date 1
Complaint—first cause of action 2
Complaint—second cause of action 3
Affidavit of attachment 4

and so on to the end.

12. TRANSCRIPT ON APPEAL—WHEN SENT UP.

Transcripts on appeal to the Supreme Court shall be forwarded to that Court in twenty days after the case agreed, or case settled by the judge, is filed in office of clerk of the Superior Court. Con. Stats., sec. 645.

13. REPORTS OF CLERKS AND COMMISSIONERS.

Every clerk of the Superior Court, and every commissioner appointed by such court, who, by virtue or under color of any order, judgment, or decree of the court in any action or proceeding pending in it, has received or shall receive any money or security for money, to be kept or invested for the benefit of any party to such action, or of any other person, shall, at the term of such court held on or next after the first day of January in each year, report to the judge a statement of said fund, setting forth the title and number of the action, and the term of the court at which the order or orders under which the officer professes to act were made, the amount and character of the investment, and the security for the same, and his opinions as to the sufficiency of the security. In every report, after the first, he shall set forth any change made in the amount or character of the investment since the last report, and every payment made to any person entitled thereto.

The report required by the next preceding paragraph shall be made to the judge of the Superior Court holding the first term of the court in each and every year, who shall examine it, or cause it to be examined, and, if found correct, and so certified by him, it shall be entered by the clerk upon his book of accounts of guardians and other fiduciaries.

14. RECORDARI.

The Superior Court shall grant the writ of *recordari* only upon the petition of the party applying for it, specifying particularly the grounds of the application for the same. The petition shall be verified and the writ may be granted with or without notice; if with notice, the petition shall be heard upon answer thereto duly verified, and upon the affidavits and other evidence offered by the parties, and the decision thereupon shall be final, subject to appeal as in other cases; if granted without notice, the petitioner shall first give the undertaking for costs, and for the writ of *supersedeas*, if prayed for as required by the Revisal, sec. 584. In such case the writ shall be made returnable to the term of the Superior Court of the county in which the judgment or proceeding complained of was granted or had, and ten days notice in writing of the filing of the petition shall be given to the adverse party before the term of the court to which the writ shall be made returnable. The defendant in the petition, at the term of the Superior Court to which the said writ is returnable, may move to dismiss, or answer the same, and the answer shall be verified. The court shall hear the application at the return term thereof (unless for good cause shown the hearing shall be continued) upon the petition, answer, affidavits, and such evidence as the court may deem pertinent, and dismiss the same, or order the case to be placed on the trial docket according to law.

In proper cases the court may grant the writ of *certiorari* in like manner, except that in case of the suggestion of a diminution of the record, if it shall manifestly appear that the record is imperfect, the court may grant the writ upon motion in the cause.

15. JUDGMENT—WHEN TO REQUIRE BONDS TO BE FILED.

In no case shall the court make or sign any order, decree, or judgment directing the payment of any money or securities for money belonging to any infant or to any person until it shall first appear that such person is entitled to receive the same and has given the bonds required by law in that respect, and such payments shall be directed only when such bonds as are required by law shall have been given and accepted by competent authority.

16. NEXT FRIEND—HOW APPOINTED.

In all cases where it is proposed that infants shall sue by their next friend, the court shall appoint such next friend, upon the written application of a reputable, disinterested person closely connected with such infant; but if such person will not apply, then, upon the like application of some reputable citizen; and the court shall make such appointment only after due inquiry as to the fitness of the person to be appointed.

17. GUARDIANS AD LITEM—HOW APPOINTED.

All motions for a guardian *ad litem* shall be made in writing, and the court shall appoint such guardian only after due inquiry as to the fitness of the person to be appointed, and such guardian must file an answer in every case.

18. CASES PUT AT FOOT OF DOCKET.

All civil actions that have been at issue for two years, and that may be continued by consent at any term, will be placed at the end of the docket for the next term in their relative order upon the docket. When a civil action shall be continued on motion of one of the parties, the court may, in its discretion, order that such action be placed at the end of the docket, as if continued by consent.

19. WHEN OPINION IS CERTIFIED.

When the opinion of the Supreme Court in any cause which had been appealed to that Court has been certified to the Superior Court, such cause shall stand on the docket in its regular order at the first term after receipt of the opinion for judgment or trial, as the case may be, except in criminal actions in which the judgment has been affirmed. Con. Stats., sec. 4656.

20. CALENDAR.

When a calendar of civil actions shall be made under the supervision of the court, or by a committee of attorneys under the order of the court or by consent of the court, unless cause be shown to the contrary, all actions continued by consent, and numbered on the docket between the first and last numbers placed upon the calendar, will be placed at the end of the docket for the next term, as if continued by consent, if such actions have been at issue for two years.

21. CASES SET FOR A DAY CERTAIN.

Neither civil nor criminal actions will be set for trial on a day certain, or not to be called for trial before a day certain, unless by order of the court; and if the other business of the term shall have been disposed of before the day for which a civil action is set, the court will not be kept open for the trial of such action, except for some special reason apparent to the judge; but this rule will not apply when a calendar has been adopted by the court.

22. CALENDAR UNDER CONTROL OF COURT.

The court will reserve the right to determine whether it is necessary to make a calendar, and, also, for the dispatch of business, to make orders as to the disposition of causes placed upon the calendar and not reached on the day for which they may be set.

23. NONJURY CASES.

When a calendar shall be made, all actions that do not require the intervention of a jury, together with motions for interlocutory orders, will be placed on the motion docket, and the judge will exercise the right to call the motion docket at any time after the calendar shall be taken up.

24. APPEALS FROM JUSTICES OF THE PEACE.

Appeals from justices of the peace in civil actions will not be called for trial unless the returns of such appeals have been docketed ten days previous to the term, but appeals docketed less than ten days before the term may be tried by consent of parties.

25. ON CONSENT CONTINUANCE—JUDGMENT FOR COSTS.

When civil action shall be continued by consent of parties, the court will, upon suggestion that the charges of witnesses and fees of officers have not been paid, adjudge that the parties to the action pay respectively their own costs, subject to the right of the prevailing party to have such costs taxed in the final judgment.

26. TIME TO FILE PLEADINGS—HOW COMPUTED.

When time to file pleadings is allowed, it shall be computed from the adjournment of the court.

27. COUNSEL NOT SENT FOR.

Except for some unusual reason, connected with the business of the court, attorneys will not be sent for when their cases are called in their regular order.

28. CRIMINAL DOCKETS.

Clerks of the courts will be required, upon the criminal dockets prepared for the court and solicitor, to state and number the criminal business of the court in the following order:

First. All criminal causes at issue.

Second. All warrants upon which parties have been held to answer at that term.

Third. All presentments made at preceding terms, undisposed of.

Fourth. All cases wherein judgments *nisi* have been entered at the preceding term against defendants and their sureties, and against defaulting jurors or witnesses in behalf of the State.

29. CIVIL AND CRIMINAL DOCKETS—WHAT TO CONTAIN.

Clerks will also be required, upon both civil and criminal dockets, to bring forward and enter in different columns of sufficient space, in each case:

First. The names of the parties.

Second. The nature of the action.

Third. A summary history of the case, including the date of issuance of process, pleadings filed, and a brief note of all proceedings and orders therein.

Fourth. A blank space for the entries of the term.

30. BOOKS.

The clerks of the Superior Courts shall be chargeable with the care and preservation of the volumes of the Reports, and shall report at each term to the presiding judge whether any and what volumes have been lost or damaged since the last preceding term.

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ABANDONMENT.

1. *Abandonment—Husband and Wife—Statutes.*—The provisions of C. S., 4447, as to abandonment, applies to the abandonment by the husband of his wife before children born of the marriage, making it an indictable offense. *S. v. Faulkner*, 635.

2. *Same—Marriage and Divorce—Defenses.*—Where the husband has been indicted, tried, and convicted for the criminal abandonment of his wife, C. S., 4447, and upon appeal he has been granted a new trial, the fact that since his former conviction his wife has obtained an absolute divorce from him will not avail him as a defense. *Ibid.*

3. *Abandonment—Statutes—Enlargement of Powers.*—C. S., 4449, conferring upon the judge having jurisdiction of the offense of the husband abandoning his wife, etc., the power to provide for the support of the abandoned wife and children is in addition to the powers conferred by the previous section (4447), and does not otherwise modify or interfere with its force and effect in making the abandonment of the wife a misdemeanor. *Ibid.*

4. *Abandonment — Constitutional Law — Legislative Discretion — Misdemeanors — House of Correction — Imprisonment.*—Our Constitution, Art. II, sec. 4, making a person guilty of a misdemeanor punishable by commitment to houses of correction leaves this matter discretionary with the legislative power to impose a sentence of imprisonment upon a husband convicted of abandonment under C. S., 4447, and other offenses of like kind, or to assign them to work on the roads during their term. C. S., 1359. *Ibid.*

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1. *Actions—Damages—Value of Property—Burden of Proof—Evidence—Fraud.*—In an action to recover the value of tobacco the plaintiffs alleged they had purchased from the landlord and the tenant renting upon shares, there was evidence tending to show that a part of this tobacco was secretly taken by the defendants from a place where the plaintiffs had stored it, and concealed on the premises of one of the defendants and sold by him on the warehouse floor, a place more inconvenient than the neighboring tobacco market, where ordinarily it would have been sold: *Held*, the burden was on the plaintiffs to prove themselves the purchasers, as they alleged, and it was competent for them to do so by their own direct testimony and that of the sellers, and also the value of the tobacco thus taken, and circumstances tend-

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ing to show fraudulent transactions among the defendants finally concluding in the sale upon the warehouse floor in a secretive manner. *Nowell v. Basnight*, 142.

2. *Actions—Parties—Bankruptcy—Trustees.*—The trustee in bankruptcy may come into an action brought prior to the adjudication by a creditor of the bankrupt, to the end that the rights of creditors, secured and unsecured, may be represented and their priorities determined by the final judgment in the action. *Eakes v. Bowman*, 174.

3. *Actions—Misjoinder—Parties—Causes of Action—Husband and Wife—Demurrer — Dismissal—Retention Upon Terms—Courts—Statutes.*—An action brought by the wife in which her husband has joined, each independently seeking to recover from the defendant the value of their services separately rendered, upon a *quantum meruit*, is a misjoinder both of parties plaintiff and causes of action, which will ordinarily be dismissed upon demurrer; but the court may sustain the demurrer and permit the defect to be cured by an amendment and the wife's cause proceeded with upon such terms as it considers just. C. S., 516. *Shore v. Holt*, 312.

4. *Same—Pleadings—Amendments—Appeal and Error—Remanding Cause—Procedure.*—While the husband is not a necessary party to his wife's action to recover for the value of her services rendered upon a *quantum meruit*, C. S., 2513, his joinder therein as a party plaintiff is not improper; and where he has alleged an independent cause of action upon a *quantum meruit*, the Supreme Court, on appeal, in the exercise of its discretion, may remand the cause with direction that the allegations of the complaint as to the statement of the husband's cause be stricken out and the action of the wife proceeded with. *Ibid.*

5. *Actions—Motion in the Original Cause—Independent Actions—Sheriffs—Amercement—Statutes—Courts.*—The court may not regard an independent action as a motion in the original cause when the latter is not before it; and where the sheriff is liable for the penalty prescribed by C. S., 3936, for failure to serve a warrant in an action before a justice of the peace, and the plaintiff brings an independent action for the recovery of the penalty before another justice, from whose judgment the defendant has appealed, and a trial *de novo* had in the Superior Court, it is error for the trial judge to regard the summons and complaint in the independent action (C. S., 4396) as a motion in the cause under said section 3936, and proceed with the trial accordingly. The question as to whether the action could be maintained as an independent one under the provisions of C. S., 4396, is not before the Supreme Court on this appeal. *Walker v. Odom*, 557.

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ADVANCEMENTS—*Continued.*

son, reciting a consideration of love and affection and the sum of $700: *Held*, some evidence from which the jury could infer that the $700 was the enhanced value of the land during the intervening period over and above the increased value of the advancement made to the daughter in 1905, and that it was the grantor's intention thus to equalize the advancements. *Nobles v. Davenport*, 162.

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1. *Appeal and Error — Judgments — Fragmentary Appeals—Dismissal—Corporation Commission.*—An appeal lies under the provisions of statute, from an order of the Corporation Commission fixing certain rates to be charged by a public-service corporation to its customers for furnishing them with electrical power, C. S., 1097-8, to the Superior Court, where the trial will be *de novo*, with the presumption that the rates so fixed by the Corporation Commission are prima facie just and reasonable, and from thence only will a further appeal lie to the Supreme Court, governed by the rule that it must not be fragmentary, but that it shall be from a final judgment or one final in its nature. *Corporation Com. v. Mfg. Co.*, 17.

APPEAL AND ERROR—*Continued.*

2. *Same—Objections and Exceptions—Procedure.*—Where the ruling of the Superior Court does not amount to a final judgment, or one final in its nature, the remedy of the party adversely affected is by exception, preserving his right until such appeal may be had from a final judgment. *Ibid.*

3. *Appeal and Error — Judgments — Parties—Jurisdiction—Fragmentary Appeal—Corporation Commission.*—Where the customers of a public-service corporation are properly joined upon notice, and participate in the hearing before the Corporation Commission upon the question of whether the petitioning corporation should be allowed to raise its rates of charges for electrical power furnished them, and appeal to the Superior Court from the rates fixed by the commission as just and reasonable, the ruling as to the rates so fixed shall be regarded as single and entire, applying to all, and some of the users may not separate themselves from the others and appeal to the Supreme Court from an order overruling their exception for the lack of authority of the commission to make the rates, the appeal being fragmentary, and not from a final judgment or one in its nature final. *Ibid.*

4. *Appeal and Error—Fragmentary Appeal—Supreme Court—Opinions—Discretion.*—The Supreme Court may dismiss an appeal as fragmentary and express its opinion on the merits upon matters duly presented of record, when it appears that the case is one of importance and an opinion is desirable as a guide to the parties in the further proceedings in the case. *Ibid.*

5. *Appeal and Error — Judgment Vacated — Reference—Pleadings—Procedure.—Held*, an order by the Superior Court judge holding, upon the facts stated, that the plaintiff could not recover the purchase price of lumber, the subject of the action, but damages alone, and rereferring the case, permitting amendments to the pleadings, was too drastic and should be vacated; and the cause is remanded to the end that the exceptions filed to the referee's report may be passed upon according to the usual course and practice of the court in such cases, without regard to said order. *Burger v. Tatham*, 37; *Crisp v. Burger*, 37.

6. *Appeal and Error Evidence—Issues—Verdict—Harmless Error.*—The admission of evidence upon an issue answered in appellant's favor cannot be held as prejudicial, or entitle him to a new trial thereon. *Construction Co. v. R. R.*, 43.

7. *Appeal and Error—Agreed Case—Supreme Court—Petition—Additional Agreement.*—Where the Supreme Court has decided an appeal upon a case agreed submitted to the Superior Court, it may reconsider the case upon a petition setting forth material additional facts agreed to by the parties. *Roebuck v. Trustees*, 184 N. C., 611, cited and applied. *Miller v. Scott*, 93.

8. *Same—Wills—Deeds and Conveyances Fee-Simple Title.*—Where the will of the husband upon a case agreed has been construed on appeal as giving the wife a life estate only, without power to convey the fee according to her contract of sale; but it is made further to appear upon petition to the Supreme Court, under an additional agreement of the parties, that the will empowered the wife, as executrix, to pay his funeral expenses and his other debts, and she had contracted to sell

APPEAL AND ERROR—*Continued.*

the *locus in quo* for that purpose: *Held*, under the further agreed statement, the wife may convey the fee-simple title to the proposed purchaser thereof, and the former decision is set aside. *Ibid.*

9. *Appeal and Error—Assignments of Error—Records—Briefs—Rules of Court—Dismissal.*—Appellant is required to set out his assignments of error in the record, and discuss them in his brief, or they will not be considered by the Supreme Court on appeal, under the rules regulating appeals. *Bunn v. Dunn*, 108.

10. *Appeal and Error—Evidence—Record.*—Exception to the exclusion of testimony upon the trial will not be considered on appeal when the appellant has failed to set out the excluded testimony in the record, so that the Supreme Court may pass upon its competency. *Nowell v. Basnight*, 143.

11. *Appeal and Error—Burden on Appellant—Claim and Delivery—Replevin—Sales—Value of Property—Seizure.*—Where, in claim and delivery, the defendant has replevied and sold an automobile, the subject of the action, exception to the plaintiff's testimony of the value of the car, on the issues of plaintiff's damages because it does not appear that it related to the time of seizure, is untenable on defendant's appeal, it being required that he show error therein, which does appear of record on his appeal in this case. *Newsome v. Cothrane*, 161.

12. *Appeal and Error—Second Appeal—Decisions—Law of the Case.*—The decision of the Supreme Court on a former appeal is the law of the case in further proceedings in the Superior Court, where a new trial has been ordered, and also on a second appeal to the Supreme Court. *Nobles v. Davenport*, 163.

13. *Appeal and Error—Evidence—Deeds and Conveyances—Title—Immaterial Matters—Verdict.—Held*, under the facts of this case, the introduction in evidence of the defendant's deed to the timber standing on the lands, conveyed by a common source of title to the plaintiff, could not have prejudiced the plaintiff, who was found by the jury not to have the title to the timber, and plaintiff's exception thereto cannot be sustained on appeal. *Roberts v. Massey*, 164.

14. *Appeal and Error—Court's Discretion.*—Where the trial judge has ruled on appellant's motions concerning matters in the exercise of his sound discretion, the appellant, to sustain his exceptions on appeal, must show an abuse of this discretion. *Ibid.*

15. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—The trial judge, as has often been said and reiterated, should be afforded an opportunity to correct an erroneous statement of the contentions of the parties in his charge to the jury, and an exception thereto after verdict comes too late to be considered on appeal. *Currie v. Malloy*, 207.

16. *Appeal and Error — Instructions — Requests for Instructions — New Trials.*—Exception that the charge of the court was not sufficiently full upon a phase of the controversy arising upon the pleadings and evidence should be taken to the refusal of the court of appellant's

APPEAL AND ERROR—*Continued.*

prayer for instruction covering the matter complained of, and where the principles of law involved are sufficiently stated in the general charge, a new trial will not be granted on appeal. *Ibid.*

17. *Appeal and Error — Instructions—Evidence—Presumptions.*—The evidence as recited in the charge of the court will be assumed to be correct on appeal, it being required that the appellant show error. *Ibid.*

18. *Appeal and Error—Instructions—Harmless Error.*—Where the trial has proceeded upon the theory that in actions for false arrest and imprisonment it is necessary for a recovery to show malice on defendant's part, and an issue has been submitted to the jury to that effect, an instruction requiring the plaintiff to show the affirmative of the issue is in defendant's favor and cannot be held for reversible error on his appeal. *Butler v. Mfg. Co.*, 250.

19. *Appeal and Error—Record—Facts Presumed.*—Facts appearing upon the record and unchallenged in the argument are taken as true on this appeal by defendant seeking to set aside a judgment by default final, taken pending the hearing upon his motion for a change of venue under the provisions of C. S., 470. *Roberts v. Moore*, 255.

20. *Appeal and Error—Certiorari—Laches.*—It appearing on this motion for a *certiorari* by the appellants to bring up the case tried in the Superior Court for review in the Supreme Court, that the record proper has been properly filed, and the failure of the record to have been docketed in time was for reasons beyond the appellant's control, and that he was not guilty of laches, but that he has a case appearing to be meritorious: *Held*, the writ prayed for is granted, though the Court does not commend the irregular manner in which the petition was prepared and the informal manner of stating the facts. *Wood v. Roberts*, 264.

21. *Appeal and Error—Evidence—Objections and Exceptions—Waiver.*—Where, among other things, the actionable negligence of the defendant depended upon whether it had furnished the plaintiff, its employee, sufficient help to unload poles from a railroad car, the error, if any (*Marshall v. Tel. Co.*, 181 N. C., 292), in permitting the plaintiff to testify that "they did not have sufficient help" is rendered harmless by the failure of the defendant to object to this evidence in response to questions afterwards asked by the court. *Hollifield v. Tel. Co.*, 172 N. C., 724, cited. *Gentry v. Utilities Co.*, 285.

22. *Appeal and Error—Rules of Court—Dismissal—Motions—Reinstatement.* A motion to reinstate a case on appeal that has been dismissed on appellee's motion, for nonconformity with the rules of Court requiring the record to be indexed, and to show the appellant's exceptions under proper assignments of error, etc., in accordance with the manner specified, will be denied, when the granting of the motion would not cure the fatal defects upon which the appellee's motion had been granted. *Redding v. Dunn*, 311.

23. *Appeal and Error—Issues—Courts.*—The submission by the court to the jury of a greater number of issues than those tendered by the appel-

APPEAL AND ERROR—*Continued.*

lant, to enable the parties to have the full benefit of their contentions to the jury, cannot be held for reversible error. *Bank v. Yelverton*, 314.

24. *Appeal and Error—Instructions—Evidence—Immaterial Variations.*—An immaterial variance between the judge's statement of appellant's evidence in his charge and that given upon the stand will not be held for reversible error. *Ibid.*

25. *Appeal and Error—Decisions—New Trials—Law of the Case.*—Where, upon a former appeal in the same case, it has been decided that the defendant could not show a contemporaneous parol agreement to vary a written contract, as a defense to an action for its breach; and it appears on the second appeal that through the amendment to his answer the defendant's testimony had been erroneously excluded on the second trial, tending to show that by a prior verbal agreement the written instrument should only be binding upon a contingency that had never occurred: *Held*, the former decision is not controlling as the law of the case upon a new trial ordered. *Building Co. v. Sanders*, 329.

26. *Appeal and Error—Record—Case on Appeal—Conflicting Statements—Findings of Fact—Judgments.*—Where the record proper and the statement of the case on appeal are contradictory the record will control. *Moore v. Moore*, 332.

27. *Appeal and Error—Summons—Service—Motions—Objections and Exceptions.*—An appeal to the Supreme Court will not directly lie from the refusal of the Superior Court judge to dismiss an action upon the ground of improper service, but upon exception taken the matter will be considered on appeal from a final judgment. *Wright v. R. R.*, 354.

28. *Appeal and Error—Appellant—Burden of Proof.*—The appellant must show in the Supreme Court prejudicial error to his rights in the Superior Court. *Plyler v. R. R.*, 358.

29. *Appeal and Error—Objections and Exceptions—Record.*—Where exceptions set out in appellant's summary thereof do not conform to the exceptions shown in the statement of the case on appeal settled by the judge, the latter will prevail. *Brown v. Hillsboro*, 368.

30. *Appeal and Error—Objections and Exceptions—Questions and Answers—Evidence.*—Appellant must except to a question asked a witness upon the trial at the time the question was asked, or he will be deemed to have waived his right to have his exception to the admission of the evidence considered on appeal. *Ibid.*

31. *Appeal and Error — Objections and Exceptions — Record—Appellant's Summary of Exceptions.*—Exceptions to the instructions of the court should be specific and stated separately in articles numbered; and it is preferable that no exception contain more than one proposition; and additional exceptions to those appearing of record and afterwards inserted in the appellant's summary of exceptions will not be considered on appeal. *Ibid.*

32. *Appeal and Error—Record.*—The record of a case on appeal to the Supreme Court should be prepared to avoid confusion and to present the facts consecutively and in regular order; and the record in this appeal is not commended. *Walker v. Walker*, 381.

APPEAL AND ERROR—*Continued.*

33. *Appeal and Error—Courts—Orders—Judgments—Sales—Executors and Administrators—Presumptions.*—On appeal to the Supreme Court from an order of the judge denying the petitioner's prayer for the confirmation of a private sale, as administratrix of her husband's estate, she had agreed to make to her two sons, under the objection of others of the heirs at law, the presumption is, nothing else appearing, that there was sufficient evidence before the judge to sustain his findings of fact upon which he had based his order; and in this case, *held*, there was evidence of record appearing from the verified pleadings and affidavits of respondent, sufficient to sustain his order that the property be advertised and sold at public outcry. *In re Brown*, 399.

34. *Same—Statutes.*—The provisions of C. S., 69, allowing the personal representative in certain cases, upon application to the clerk and obtaining his order therefor, to expose certain personal property therein specified at private sale for the best obtainable price, and report the sale for confirmation, does not take away from the clerk, or judge on appeal, the sound discretionary powers of determining whether a public or private sale would best subserve the interest of the parties, or to authorize a private sale when in the discretion of the clerk or judge, as the case may be, it was to their best interest. *Ibid.*

35. *Appeal and Error—Final Judgments—Corporation Commission—Mandamus—Cause Retained—Judgments.*—It appearing on appeal from the record in this case that an alternate writ of mandamus allowing the defendants an opportunity to be heard before the issuance of the peremptory writ, from the Superior Court, would not have advantaged the appellant; final judgment is entered in the Supreme Court that a peremptory mandamus issue, that defendant comply with the order of the Corporation Commission and proceed to construct the station with reasonable diligence, retaining the cause for the present for such further orders and directions as in the opinion of the Supreme Court may be required. *Corporation Com. v. R. R.*, 438.

36. *Appeal and Error—Verdict—Excessive—Damages.*—The verdict of a jury will not be disturbed on appeal to the Supreme Court as being excessive when it is not made to appear that it was the result of passion or prejudice, or clearly or grossly excessive. *Hulin v. Tel. Co.*, 470.

37. *Appeal and Error—Executors and Administrators—Revocation of Letters—Findings—Evidence.*—The findings of fact by the judge of the Superior Court upon appeal from the clerk of the Superior Court refusing to set aside letters of administration the latter had issued, are conclusive on appeal when supported by competent evidence. *In re Martin*, 473.

38. *Appeal and Error—Examination of Books of Adverse Party—Statutes.* An appeal to the Supreme Court presently lies to an order made by the Superior Court judge providing for examination and copies of books and papers in the possession of the adverse party to the action under the provisions of C. S., 1823 *et seq.*, and unless the statutory provisions have been complied with, or if the order goes beyond the powers contemplated and conferred by law, it will be set aside. *Ross v. Robinson*, 548.

APPEAL AND ERROR—*Continued.*

39. *Appeal and Error—Dismissal—Discovery—Examination of Books, etc., of Adverse Party.*—An appeal from an order of the Superior Court judge allowing examination of books, papers, etc., of the adverse party under the provisions of C. S., 1823 *et seq.*, cannot be maintained, when it appears from the record that it is frivolous and for the mere purpose of delay; and the appellee may docket the appellant's case and have it dismissed under the rule of the Supreme Court relating to such matters. *Ibid.*

40. *Appeal and Error—Dismissal—Frivolous Appeal—Discovery—Supreme Court—Motions—Corporations—Shareholders—Principal and Agent—Accounting.*—In an action against a corporation and its selling agent by its minority stockholders, which the corporation had refused to institute, to compel the agent to properly account for and pay over to its codefendant large sums of money it had received and wrongfully withheld from the corporation, to its damage and that of its shareholders, upon proper motion and petition the Superior Court entered an order providing for an inspection and taking copies at plaintiffs' expense of the books of the defendants for a certain period, as necessary to obtain pertinent and necessary facts for an intelligent and proper trial upon the issues raised by the answers, from which the defendants appealed. Upon motion duly made by plaintiffs in the Supreme Court to docket and dismiss defendants' appeal: *Held*, upon the record, the appeal was shown to be frivolous, and for the purpose of delay, and the motion was allowed. *Ibid.*

41. *Appeal and Error—Docketing—Dismissal—Capital Felony—Escape—Criminal Law—Rules of Court.*—Upon the failure of appellant to docket his appeal in the Supreme Court from the conviction of a capital felony, within the time prescribed by the rule, it will be docketed and dismissed unless a motion is made for a *certiorari* at the next succeeding term, and sufficient cause shown for the failure to docket in time; and the fact that he had fled the State and remained absent until arrested and brought back entitles him to no special favor. It would be discretionary with the court to affirm the judgment or dismiss the appeal, or continue the case, if the appeal had been docketed within the time required by the rule. *S. v. Dalton*, 606.

42. *Appeal and Error — Appeal Bond — Dismissal — Motions—Conditions Precedent.*—The bond required of appellant is a condition precedent to his right to have his case heard and determined on appeal, C. S., 647; and where, in response to appellee's motion to dismiss for failure to file the bond at least five days before the call of the district, the appellant fails to file a new bond according to law, or make a deposit, etc., appellee's motion to dismiss will be allowed. *Goodman v. Call*, 607.

43. *Appeal and Error—Evidence—Issues of Fact.*—The verdict of the jury upon controverted evidence of fact will not be disturbed when it appears that no error of law has been committed on the trial. *S. v. Russell*, 611.

44. *Appeal and Error—Evidence—Hearsay—Subsequent Competency.*—The exclusion of hearsay evidence and the failure of the appellant to again offer it after the later introduction of evidence that might have rendered it competent, is not error. *S. v. Faulkner*, 636.

APPEAL AND ERROR—*Continued.*

45. *Appeal and Error—Evidence—Hearsay—Harmless Error.*—That a witness on a trial for murder has stated to another witness what the deceased had stated to them, as a part of his dying declarations, is at least harmless, if objectionable as hearsay, when it is but a repetition of the evidence to which he has testified. *S. v. Williams*, 644.

46. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—The recitation of the judge of the State's contentions upon a trial for murder, if incorrect, should be called to the attention of the judge in time for him to make proper correction, or objection thereto will be considered as waived; and such cannot be objectionable as an expression of his opinion upon the facts when he has clearly told the jury that he had none and had not formed one, and his language was not in form or substance equivalent to such an expression of his opinion. *Ibid.*

47. *Appeal and Error—Harmless Error.*—Only prejudicial error is reversible on appeal. *Ibid.*

48. *Appeal and Error—Record Proper—Case on Appeal—Conflict—Criminal Law—Jury of Twelve—Misdemeanor—Waiver.*—The record proper in a case on appeal "imparts verity," and will control when there appears to be conflicting statements between such record and the statement of the case on appeal; and where on the statement in the case on appeal from a criminal case charging a misdemeanor, the record proper states the case was tried by twelve jurors who rendered an unanimous verdict against the defendant, he may not show by the case on appeal that he was denied his constitutional right to a trial by twelve jurors. *Semble*, the defendant tried for a misdemeanor may consent to try his case with eleven jurors when one of them has become sick, or rendered incapable of continuing to serve. *S. v. Wheeler*, 670.

49. *Appeal and Error—Questions and Answers—Objections and Exceptions.* Where the answer to a question of the witness is proper, but the witness had added information that was incompetent evidence, the appellant should object to the incompetent part of the answer. *S. v. Foster*, 675.

50. *Appeal and Error—Objections and Exceptions—Instructions—Contentions.*—An exception to the manner in which the trial judge stated the defendant's contentions is not available to him when taken for the first time after verdict. *S. v. Miller*, 680.

51. *Appeal and Error—Homicide—Presence of Militia—Prejudice.—Held*, under the circumstances of this case, the appellant from a judgment of murder on the first degree was not prejudiced by the presence of a detachment of State militia in the courtroom when the verdict was returned. *Ibid.*

52. *Appeal and Error—Objections and Exceptions—Evidence—Questions and Answers.*—Exceptions to the exclusion of questions asked witnesses on a trial will not be considered on appeal when it does not appear what the answers would have been. *S. v. Sisk*, 696.

53. *Appeal and Error—Objections and Exceptions—Contentions—Instruction.*—The appellant is required to call to the attention of the trial

APPEAL AND ERROR—*Continued.*

judge a mistake or error in reciting his contentions to afford the judge an opportunity to correct an inadvertence, if any, and an exception thereto after verdict comes too late to be considered on appeal. *S. v. Reagan*, 711.

54. *Appeal and Error — Harmless Error — Instructions—Character—Evidence.*—Where testimony both of the good and bad character of the defendant tried for larceny and receiving has been introduced, and a State's witness has voluntarily qualified his testimony by stating his character was bad "in regard to his dealing in liquor," a charge of the Court saying in what respect the evidence is to be considered is not prejudicial to the defendant, and will not be held for reversible error. *Ibid.*

55. *Appeal and Error — Objections and Exceptions—Evidence—Harmless Error.*—The appellant, by objection, must call to the attention of the trial judge an erroneous statement he has made in stating his contentions to the jury in time to afford the judge opportunity for correction, and an exception otherwise taken will not be considered on appeal. *S. v. Edmonds*, 722.

56. *Appeal and Error—Settlement of Case—Stenographer's Notes.*—The trial judge must settle the case on appeal to the Supreme Court within the time allowed by law, whether the stenographer has transcribed her notes of the evidence on the trial or not. *S. v. Butner*, 731.

57. *Same—Extension of Time.*—The failure or inability of the official stenographer at the trial to transcribe the notes thereof in time, does not excuse the appellant for failure to make out and serve his case within the time allowed by law. The excessive time allowed for this purpose in some instances is commented upon unfavorably. *Ibid.*

58. *Same—Record Proper—Docketing—Certiorari—Discretion of Court.*—Where the appellant has been unable to bring up his case on appeal within the time allowed him by law, he must comply with the rule to docket the record proper and move for a *certiorari*, so that the Supreme Court may exercise its discretion in passing upon the merits of the motion; otherwise the appellant has lost his right of appeal, and the consent of the parties cannot preserve it. *Ibid.*

59. *Same—Legislative Powers—Rules of Court—Constitutional Law.*—The power of the Legislature to permit an extension of the time for settling the case on appeal does not permit it to impinge upon the rule of the Supreme Court requiring the docketing thereof, within a prescribed time, or the issuance by the court of a *certiorari*, in its discretion. *Ibid.*

60. *Appeal and Error—Motion to Dismiss—Reinstatement—Res Judicata.* The refusal by the Supreme Court of appellant's motion for a *certiorari* is *res judicata* upon his later motion to reinstate the case upon the same grounds. *Ibid.*

61. *Same—Assignments of Error—Meritorious Case.*—Upon a motion in the Supreme Court to reinstate a case that has been dismissed, it is required that the appellant should have properly assigned his errors to the judgment to be brought up for review and show a meritorious case. *Ibid.*

APPEAL AND ERROR—*Continued.*

62. *Appeal and Error—Rules of Court—Conditions Precedent.*—An appellant's right of appeal to the Supreme Court is dependent upon his observance of the rules regulating appeals. *Ibid.*

63. *Appeal and Error—Evidence—Subsequent Admission.*—The admission of evidence upon the trial that had formerly been excluded does not constitute reversible error for its prior exclusion. *S. v. Jestes*, 735.

64. *Appeal and Error—Evidence—Questions and Answers—Record.*—The expected answers to questions excepted to must appear of record on appeal, in order that the court may pass upon the question of error in the exclusion of the questions. *Ibid.*

65. *Appeal and Error—Objections and Exceptions—Instructions—Contentions—Waiver—Record.*—Exception to the judge's statement to the jury of appellant's contentions will not be considered on appeal when for the first time noted in his assignments of error, for then they are deemed as waived by him. *Ibid.*

APPEARANCE. See Summons, 1; Criminal Law, 21.

APPLIANCES. See Negligence, 16; Instructions, 8.

APPLICATION. See Criminal Law, 1.

APPORTIONMENT. See Municipal Corporations, 27.

ARBITRATION. See Probate, 5.

ASSAULT. See Criminal Law, 27.

ASSESSMENT. See Municipal Corporations, 6.

ASSIGNMENT FOR CREDITORS.

1. *Assignments for Benefit of Creditors—Debtor and Creditor—Insolvency—Preëxisting Debts—Mortgages—Deeds of Trust.*—A deed of trust by an insolvent debtor to secure a preëxisting debt or debts, omitting others, though in the form of a mortgage with a defeasance clause, will be construed as an assignment for the benefit of creditors, requiring that the provisions of the statute on the subject to have been complied with for it to be valid; and this interpretation is not affected by the fact that a small portion of the debtor's property was not included in the assignment in this case, an equity of redemption ascertained to have no value. *Eakes v. Bowman*, 174.

2. *Same.*—The debtor, owning lands in two counties gave a mortgage to secure the balance of the purchase price on the lands in the first county, and a second deed of trust on this land to another to secure borrowed money, which was sold under the first mortgage and found insufficient to pay it off. The debtor gave a deed of trust on the lands in the second county to secure preëxisting debts, attempting, also, to mortgage the crops to be grown thereon for three years; and later, and as further security, gave a mortgage on the crops to be grown thereon for a certain year. The property thus dealt with was practically all the debtor owned, and he was insolvent: *Held*, his mortgage of the land and crops in the second county was in effect an assignment

ASSIGNMENT FOR CREDITORS—*Continued.*

for the benefit of his creditors, and for noncompliance with the statute void as to the unpaid balance due on the mortgages, and of the other creditors. *Ibid.*

ASSIGNMENTS OF ERROR. See Appeal and Error, 9, 61.

ASSOCIATIONS. See Monopolies, 2.

ASSUMPTION. See Husband and Wife, 1.

ASSUMPTION OF RISKS. See Employer and Employee, 2, 4; Railroads, 2, 4, 5.

ATTACHMENT. See Summons, 2; Intervener, 1; Process, 2.

AUTHORITY. See Negligence, 9; Municipal Corporations, 25.

AUTOMOBILES. See Negligence, 7, 11; Husband and Wife, 7; Injunction, 2.

BAGGAGE. See Railroads, 5.

BALLOTS. See Constitutional Law, 4.

BANKRUPTCY. See Actions, 2.

Bankruptcy—Secured Claims—Proof of Claims—Composition—Waiver.—The holder of a mechanic's lien, who afterwards proves his entire claim as a secured creditor, does not waive his security, but if he proves as an unsecured creditor in the bankruptcy proceedings of his debtor, attends and participates in the meetings, and accepts his proportionate part of a composition of creditors effected under the provisions of the bankrupt act, or a dividend therein, as a general rule he places himself on a parity with the general creditors, and is deemed to have waived his security. *Walters v. Hedgepeth*, 172 N. C., 310, with regard to a lien on the bankrupt's homestead, cited and distinguished. *Davies v. Blomberg*, 496.

BANKS AND BANKING. See Evidence, 5; Equity, 8; Forgery, 1; Indictment, 1.

BENEFICIARIES. See Contracts, 10.

BENEFITS. See Infants, 5; Statutes, 4; Trusts, 5.

BILLS AND NOTES. See Criminal Law, 26.

1. *Bills and Notes—Negotiable Instruments—Equities—Notice—Inquiry—Bad Faith—Statutes.*—The principle that holds an endorser of a negotiable instrument subject to the equities existing between the original parties when the instrument is affected with fraud or infirmity is now fixed by statute, C. S., 3033, 3037; and it is now required, however conflicting the former authorities may have been, that "the person to whom it is negotiated must have had actual knowledge of the infirmity or defect or knowledge of such facts that his action in taking the instrument amounted to bad faith"; and it is reversible error for the judge to charge the jury, in effect, that he would be bound by the original equities if he had such notice as would induce a prudent man to inquire into the circumstances and discover the defect. *Holleman v. Trust Co.*, 49.

BILLS AND NOTES—*Continued.*

2. *Bills and Notes—Negotiable Instruments—Mortgages—Goods Sold and Delivered—Vendor and Purchaser—Title Retained—Purchaser for Value—Equities.*—A note under the unconditional promise of the maker to pay a specific sum of money at a designated time is a negotiable promissory note, the negotiability of which is not affected because the title to goods sold and delivered for which it was given, is retained by its further terms until payment thereof shall have been made; or containing stipulations with reference to the disposition of the proceeds and their proper application to the obligor's unqualified promise to pay as contained in the first part of the instrument; and a purchaser for full value before maturity, without notice, is not bound by equities existing between the original parties. *Trust Co. v. Leggett*, 65.

3. *Bills and Notes—Negotiable Instruments—Fraud—Evidence—Damages.* Where the plaintiff has given his negotiable note payable to defendant corporation for shares of its stock, under agreement with defendant's agent procuring it that it would not be binding unless or until the plaintiff sold his farm, of which the plaintiff would notify the defendant, which was not done, and this note is acquired in due course by an innocent purchaser for value, without notice of the equities existing between the original parties; it is evidence sufficient, with the declaration of the agent obtaining the note made to another prior thereto that he "was going out to tackle the plaintiff, and see if he could not put something over on him," to show that the defendant's agent obtained the note upon a fraudulent promise he had no intention of performing at the time he made it, and entitles the plaintiff to recover in his action for fraud and deceit against the original payee. *White v. Products Co.*, 68.

4. *Same—Written Instruments—Evidence.*—Where a negotiable instrument is void as having been obtained by fraud of the payee's agent, its further provision giving authority of the maker for its negotiation, and also reciting that he had received cash therefor, does not exclude, as between the original parties, parol evidence of the fraud in its inception, on the ground that it contradicted the written terms of the note. *Ibid.*

5. *Bills and Notes—Endorsers—Sureties—Forbearance—Notice—Statutes—Exoneration.*—The requirements of C. S., 3967, are reasonably complied with when the holder of a negotiable note, after receiving notice in accordance with this section within thirty days causes the maker to be made a party defendant, and it is made to appear that he is a nonresident, and the jurisdiction of the court in the action cannot be acquired over him. *Taylor v. Bridger*, 85.

6. *Same—Stipulations as to Waiver.*—By an agreement expressed upon the negotiable note that the endorsers will continue to be bound notwithstanding an extension of time granted to the maker, the endorsers cannot avail themselves of the provisions of C. S., 3967, when the maker is a nonresident, demand for payment after dishonor has been made upon the resident endorsers, defendants in the action, and they have delayed to give the statutory notice until after action commenced. *Ibid.*

BILLS AND NOTES—*Continued.*

7. *Bills and Notes — Negotiable Instruments—Fraud—Promises—Representations.*—While the failure to perform a promise in the future cannot, as a general rule, be the basis of setting aside a transaction for fraud, it is otherwise if the fraud be predicated upon the nonperformance of a promise and the promise is shown to have been a device to accomplish the fraud; and where the defendant has been induced to give her promissory note for shares of stock in a corporation being organized, upon the false assurance that the stock was to be pooled and afterwards sold to subscribers, and that she would not have to pay anything upon the note, it may be shown as evidence of fraud to invalidate the note, in the hands of a holder with notice of and bound by the defendant's equities, that the promise was made only as a design to procure the note, and without the promisor's intention to fulfill it. *Bank v. Yelverton*, 315.

8. *Bills and Notes—Negotiable Instruments—Fraud—Cancellation—Damages.*—One who has given her note induced by the fraudulent promise of another, upon which she has relied, and sufficient to invalidate the instrument, has the right to the cancellation of the instrument and avoid liability thereon. *Ibid.*

9. *Bills and Notes — Negotiable Instruments — Endorsement—Equities—Statutes.*—Where the maker executes her promissory note to her own order and delivers it without endorsement, any person thereafter acquiring the instrument without endorsement takes it subject to the equities existing between the original parties, C. S., 3004, 3030; the statute requiring that where the instrument is "payable to order" it is negotiated by the endorsement. C. S., 3010. *Ibid.*

10. *Bills and Notes—Negotiable Instruments—Endorsees—Fraud—Pleadings—Burden of Proof.*—The burden of proof is on the plaintiff suing upon a negotiable note as endorsee to establish the endorsement by a preponderance of the evidence, when the defendant denies the endorsement and pleads fraud. *Ibid.*

11. *Bills and Notes—Negotiable Instruments—Equities—Fraud—Evidence—Verdict.*—Where it is established by the verdict of the jury that the plaintiff acquired the negotiable instrument sued on without endorsement and with knowledge of the equities existing between the original parties that would invalidate it for fraud, the admission of evidence relating to the alteration of the note after its delivery becomes immaterial. *Ibid.*

BILLS OF LADING. See Evidence, 5; Carriers, 2.

BILLS OF PARTICULARS. See Indictment, 4.

BONDS. See Appeal and Error, 42; Criminal Law, 21; Corporations, 4; Municipal Corporations, 13, 23, 24, 25; Drainage Districts, 1; Schools, 2; Statutes, 2; Constitutional Law, 5, 6, 7; Estates, 11.

BOOKS. See Appeal and Error, 38, 39; Discovery, 1.

BOUNDARIES. See Deeds and Conveyances, 14.

Boundaries—Grants—Location of Lands—Judge Finding Facts by Consent—Evidence—Appeal and Error.—The plaintiff claimed the *locus in quo* under the provisions of C. S., 7554, as vacant and unappropriated, and

BOUNDARIES—*Continued.*

defendant filed his protest under those of C. S., 7557, the question of ownership depending upon the location of the land within the boundaries of the senior grant. Upon an agreed case the trial judge found the facts: *Held*, the boundaries of the grant were matters of law, and where the boundaries were, those of fact, and the findings of fact by the court, under the terms of the agreement, when supported by evidence, are conclusive on appeal. *Brooks v. Woodruff*, 288.

BREACH. See Monoplies, 3; Vendor and Purchaser, 2; Contracts, 5, 6, 7.

BRIDGES. See Highways, 1, 5.

BRIEFS. See Appeal and Error, 9; Intoxicating Liquors, 9.

BUILDINGS. See Municipal Corporations, 13.

BURNINGS. See Criminal Law, 28.

BURDEN OF PROOF. See Bills and Notes, 10; New Trials, 1; Deeds and Conveyances, 14; Intervener, 1; Homicide, 11; Municipal Corporations, 4; Actions, 1; Appeal and Error, 11, 28; Demurrer, 4; Evidence, 4, 16; Mandamus, 3; Railroads, 3.

CANCELLATION. See Bills and Notes, 8.

CAPITAL FELONY. See Appeal and Error, 41.

CAPTIONS. See Municipal Corporations, 14.

CARRIERS. See Navigable Waters, 1.

1. *Carriers of Goods—Railroads—Tariffs—Reshipment—Interstate Commerce Commission.*—In relation to interstate shipments by common carriage, where the Interstate Commerce Commission has accepted the published tariff of a railroad company, allowing the shippers of actual transit cotton the privilege of concentration and reshipment with a reduction of charges, at a designated station for shipments originating on its own line, expressly excluding substitution of cotton shipped to it by rail or otherwise: *Held*, carload shipments over a connecting carrier to a station on the line of said railroad, with a bill of lading from that station, given for the unbroken car, in its continuous shipment, does not conform to the requirement that the shipment must originate at a station on the line of the railroad publishing the tariff, or accord to the shipper the right of concentration at and reshipment from the designated station under the reduction of the charges. *Davis v. Cotton Mills*, 387.

2. *Same—Bills of Lading.*—Where an interstate shipment of cotton is not entitled to the provisions accorded by a railroad company for concentration and reshipment at a designated station, with reduction of charges, because it had not originated on the line of the carrier publishing the tariff, the issuance of the bill of lading by the agent at a station on its own line and accepting the freight charges, cannot alter the position of the shipper so as to give him the concentration and shipment privileges, contrary to the provisions of the carrier's tariff filed with and accepted by the Interstate Commerce Commission. *Ibid.*

CARRIERS—*Continued.*

3. *Same—Federal Law—Discrimination.*—Where a railroad company has filed and published its tariff as to concentration and reshipment privileges, at a certain station on its line of railroad, permitting a reduction of charges, neither the carrier nor its shipper may violate the Federal law by according or accepting the reduction for shipments of cotton contrary to the conditions named in the tariff, and the carrier may recover the amount of such reduction from the shipper when its own agent had received the shipment and freight charges, and has improperly issued the bill of lading therefor. *Ibid.*

4. *Carriers of Goods—Railroads—Tariffs—Contracts—Interpretation of Contracts.*—In construing the meaning of a tariff published by a railroad company and approved by the Interstate Commerce Commission, allowing at a designated station on the carrier line concentration and reshipment of cotton when originating on the carrier line, with reduction of charges, the intent of the parties as gathered from the language used will control its meaning; which will not be extended to include shipments received from connecting lines of carriage, and transported over the carrier's own line in unbroken or unloaded cars in continuous passage. *Ibid.*

CARRIERS OF GOODS. See Carriers.

CASE. See Appeal and Error, 25, 26.

CASE ON APPEAL. See Appeal and Error, 26, 48.

CAUSE OF ACTION. See Demurrer, 2; Actions, 3.

CAUSA MORTIS. See Homicide, 9.

CERTIFICATE. See Husband and Wife, 2.

CERTIORARI. See Appeal and Error, 20, 58; Criminal Law, 1, 2.

CHALLENGING. See Jury, 2.

CHAMBERS. See Mandamus, 2.

CHANGES. See Verdicts, 4.

CHARACTER. See Homicide, 2; Appeal and Error, 54; Evidence, 32, 33.

CHARGE. See Corporation Commission, 1, 3, 6, 7; Instructions, 4, 12; Criminal Law, 7, 8.

CHARTER. See Municipal Corporations, 2, 4, 17, 32; Monopolies, 5.

CHILD. See Estates, 3.

CITIES AND TOWNS. See Municipal Corporations, 1, 4, 5, 10, 11, 12, 16, 17, 18, 21, 23, 25, 26, 27, 28, 29, 30; Pleadings, 1, 8; Constitutional Law, 2, 7; Mandamus, 1; Evidence, 18, 20, 22; Partnership, 1.

CLAIMS. See Bankruptcy, 1.

CLAIM AND DELIVERY. See Appeal and Error, 11; Judgments, 8.

1. *Claim and Delivery — Value of Property—Corroborative Evidence.*—Where the value of an automobile replevied by the defendant in claim

CLAIM AND DELIVERY—*Continued.*

and delivery is material to the inquiry in the action, proof of its value within a reasonable time before or after its seizure is competent as bearing upon its value at the time of its seizure; and a witness may testify that some months before the seizure he offered to lend a certain amount of money under mortgage thereon as corroborative of his testimony of its value at the time of the seizure. *Noesome v. Cothrane*, 161.

2. *Claim and Delivery—Principal and Surety—Judgments—Remedies—Proceedings — Appeal and Error — Fraud — Actions—Motions.*—The remedy of a surety on a replevin bond to contest his liability as such under a consent judgment entered by the court against the defendant, his principal, is by appeal from the judgment, or by an independent action in case of fraud, and not by his motion in the case. *Wallace v. Robinson*, 530.

CLERKS. See Sales, 1.

CLERKS OF COURT. See Mortgages, 1, 4; Probate, 2; Venue, 3; Constitutional Law, 10.

CODE. See Courts, 3.

COLOR. See Injunction, 2.

COLLUSION. See Equity, 8; Insurance, 7.

COMMERCE. See Corporation Commission, 4; Navigable Waters, 1.

1. *Commerce—Railroads—Intrastate.*—The employment of checking baggage that had been transported from beyond the State by a railroad company, from one station in the State to another therein, is an intrastate transaction. *Hines v. R. R.*, 72.

2. *Commerce — Railroads—Intrastate Roads—Junctions—Stations—Statutes—Federal Transportation Act.*—A leased railroad by a carrier wholly within the State is an intrastate road, nor can it be otherwise regarded because crossed by an interstate carrier at one of its intermediate stations with which it exchanges passengers and freight; and an order of the Corporation Commission that these railroads build a union depot at this junction required for the safety and convenience of the passengers comes within the police powers of the State so far as it relates to the intrastate carrier, and cannot be held as contrary to the provisions of the Federal Transportation Act, giving the Interstate Commerce Commission certain authority to regulate conditions at terminal points, etc., this act not including the building of stations, and expressly excepting from its provisions the right of the State, in the exercise of its police powers, to require intrastate railroads to erect depots upon their lines of road. *Corporation Com. v. R. R.*, 437.

3. *Same—Constitutional Law—Interstate Commerce.*—The order of the Corporation Commission for the joint erection by an intrastate carrier and an interstate carrier of a union station at a junction cannot be regarded as objectionable so far as it relates to the intrastate carrier, as a burden on interstate commerce, when it appears that the commission was passing upon the petition of only a few cities or towns

COMMERCE—*Continued.*

in the State separately and not as a part of a State-wide scheme, and the expenditures required were in amount too small to affect such commerce. *Ibid.*

4. *Commerce—Statutes—State Police Powers—Rights Reserved—Congressional Omission to Act.*—Where Congress has refrained from regulating interstate commerce in certain particulars, such powers in these instances are reserved in the State in the exercise of its police power, and the State may reasonably require intrastate carriers to construct union depots along its line at junctional points with the line of an interstate carrier, especially when it will not interfere with interstate commerce, or when it is an aid to it. *Ibid.*

COMMISSIONERS. See Judgments, 1.

COMMITTEE. See Statutes, 12.

COMMON LAW. See Husband and Wife, 4.

Common Law—Procedure—Technicalities—Statutes.—The refined technicalities of the procedure at common law, in both civil and criminal cases, have most entirely, if not quite, been abolished by our statute. C. S., 4610-4625. *S. v. Hedgecock*, 714.

COMPANIES. See Deeds and Conveyances, 9.

COMPETENCY. See Appeal and Error, 44.

COMPETITION. See Trademarks, 1.

COMPOSITION WITH CREDITORS. See Bankruptcy, 1.

CONCEALED WEAPONS. See Criminal Law, 32, 34.

CONCLUSIONS. See Judgments, 4.

CONCURRING CAUSE. See Negligence, 2.

CONDEMNATION. See Railroads, 8.

CONDITIONS. See Insurance, 7; Criminal Law, 3, 4.

CONDITIONS PRECEDENT. See Contracts, 1, 10; Appeal and Error, 42, 62.

CONFLICT. See Appeal and Error, 48.

CONFLICT OF LAWS. See Statutes, 8; Intoxicating Liquors, 2.

CONGRESS. See Commerce, 4.

CONJECTURE. See Evidence, 3.

CONNECTING CARRIERS. See War, 1.

CONSENT. See Judgments, 1, 2, 5, 8; Boundaries, 1.

CONSIDERATION. See Infants, 5; Insurance, 6; Contracts, 3, 4, 8; Constitutional Law, 8.

CONSOLIDATION. See Corporation Commission, 12; Criminal Law, 9.

CONSOLIDATED STATUTES.
SEC.

64. This section does not take away the power of Superior Court judge in his sound discretion, on appeal, to order a public or private sale in proper instances. *In re Brown*, 398.

150, 156. Statute does not give executors and administrators two years to settle estate when conditions permit earlier settlement. *Snow v. Boylston*, 321.

408, 454. Wife may recover for personal services and for tort in her action against her husband. *Roberts v. Roberts*, 566.

445. Ten-year statute bars action to establish purchaser at execution sale an equitable holder of title for plaintiff's benefit. *Sexton v. Farrington*, 339.

459. Venue of action, if plaintiff is nonresident of State, is where the defendant resides or does business and is improper when defendant has no property in the county. *Roberts v. Moore*, 524.

470. Defendant for change of improper venue must move in apt time before answer filed, before the clerk, subject to right of appeal. *Ibid.*

516. Husband and his wife each suing for value of services is a misjoinder of parties, in which the court may allow amendment by striking out allegations as to husband's course, and proceed with the wife's action. *Shore v. Holt*, 312.

518. Demurrer to jurisdiction of court, or to sufficiency of complaint, may be made after answer filed, without requiring leave of court to withdraw answer. *Cherry v. R. R.*, 90.

535. Pleadings are now construed to effect substantial justice, and not against the pleader, as at common law. *Sexton v. Farrington*, 339.

536. Trial judge has sound discretionary power to allow amendments to pleadings. *Brown v. Hillsboro*, 368.

547. Discretion of trial judge to allow amendment to complaint to increase the amount of recovery, under the evidence upon the trial, before or after verdict. *Warrington v. Hardison*, 76.

564. When the evidence and inferences therefrom are consistent and not conflicting, a peremptory instruction is not erroneous. *R. R. v. Lumber Co.*, 227.

564. When instructions are correctly given not error for failure of judge to explain certain legal principles, in absence of special requests. *Bank v. Yelverton*, 314.

647. Appellant's failure to file appeal bond forfeits his appeal. *Goodman v. Call*, 607.

816 *et seq.* Nonresident express company absorbing the property in this State of another such nonresident is subject to attachment. *Parks v. Express Co.*, 428.

836. Extension of time to principal on replevy bond does not release surety. *Wallace v. Robinson*, 530.

860. A receiver may be appointed for property obtained by fraud or covin, and impressed by a trust. *Bank v. Waggoner*, 298.

CONSOLIDATED STATUTES—*Continued.*

SEC.

868. Summons to compel railroad company to observe a city ordinance is returnable before judge at chambers or in term, and he may determine the facts upon good cause shown, except where controlling issues of fact are raised. *Durham v. R. R.*, 240.

912. Defendant does not lose his right to have action removed to proper venue for failure to give notice of motion, when he is within the provisions of C. S., 470. *Roberts v. Moore*, 254.

988. A written contract to be enforceable under this section must be so reasonably certain and definite that its substance and essential elements must be understood therefrom. *Keith v. Bailey*, 262.

1035 *et seq.* Corporation Commission is authorized to fix rates of charges for public-service corporations, which only are taken as just and reasonable; appeal to Superior Court, trial *de novo* therein, thence appeal is allowed to Supreme Court, under its rules. Electricity generated in another state, distributed here, rates fixed by Commission not interference with interstate commerce. Tax valuation may be considered by Commission. *Corp. Com. v. Mfg. Co.*, 18.

1041, 1042. Order by Corporation Commission for railroads to build joint station and held up for accommodation of the railroads is complete and final. *Corp. Com. v. R. R.*, 435.

1103. Mandamus is remedy of Corporation Commission to compel railroad to comply with its order. *Ibid.*

1241. See secs. 7554, 7557. *In re Hurley*, 452.

1444. Notice of motion in civil actions must be given as a prerequisite to be heard at criminal term. *Dawkins v. Phillips*, 608.

1539. Legislature has discretionary power to imprison husband for abandonment. *S. v. Faulkner*, 635.

1667. The trial judge decides the fact as to existence of contract of separation, in suit for divorce; on appeal, the contract should appear of record; by recent statute an allowance for wife's attorneys' fees may be ordered. *Moore v. Moore*, 332.

1708. Railroads may condemn lands to carry out order of Corporation Commission to erect a station. *Corp. Com. v. R. R.*, 435.

1734. Estate to testator's son and his children not *in esse* at testator's death is an estate tail, converted into fee simple. *Zeigler v. Love*, 40.

1734. Estate to H. for life, remainder to testator's son and his bodily heirs, is converted into fee simple in son after the life estate. *Harward v. Edwards*, 604.

1737. An estate to N. for life and to the lawful heirs of her body is an estate tail, converted into a fee simple. *Vinson v. Gardner*, 193.

1744. This section contemplates the contingencies arising from a devise to testator's daughter for life, then to her children and grandchildren living at the time of her death. Commissioner to sell may make private sale with approval of court. *Midgette v. Lumber Co.*, 423.

CONSOLIDATED STATUTES—*Continued.*

SEC.

1789. Affiant must show, when objection is made to sufficiency of affidavit, that he is competent to testify to the facts as a witness. *Lloyd v. Poythress*, 180.

1795. Person making affidavit as treasurer of corporation to account stated under sec. 1789, against deceased person, must show he is not disqualified for interest under this section. *Ibid.*

1823. An appeal directly lies to the Supreme Court from order of Superior Court judge allowing examination of books, etc., in possession of adverse parties. It will be dismissed if frivolous. *Ross v. Robinson*, 548.

2326. Exception that juror drawn under this section has served in last two years is untenable. *S. v. Williams*, 643.

2591. Clerk of court acquires jurisdiction when advanced bid is paid to him, with limited authority to order sales and resales. Upon compliance with statutes, he must order title to be made purchaser, which afterwards may be supplied *nunc pro tunc*. *Lawrence v. Beck*, 196.

2606. Wife may recover for personal services and torts in her action against her husband. *Roberts v. Roberts*, 566.

2710 (14). Assessments against owners of land abutting on streets are not a tax within the meaning of the statute. *Tarboro v. Forbes*, 59.

2714. Objection to assessment of property on street improved should be made to sufficiency of petition, and not thereafter to issuance of bonds for the improvements. *Brown v. Hillsboro*, 369.

3004, 3010, 3030. A holder of a note without endorsement takes subject to equities existing between original parties. *Bank v. Yelverton*, 314.

3309. This section does not apply to the enforcement of parol trusts. *Spence v. Pottery Co.*, 218.

3033. Endorser of negotiable paper must have knowledge of infirmity or of such facts as amount to bad faith. *Holleman v. Trust Co.*, 49.

3309. Sale of land under execution conveys title superior to unregistered *Wimes v. Hufham*, 178.

3379. Evidence that defendant had quantites of spirituous liquors concealed sufficient for conviction in this case. *S. v. Potter*, 742.

3379, 3384, 3386. A conviction under an indictment under these three sections "that the defendant was guilty of receiving more liquor than allowed by law" comes under sec. 3385, and responsive to issues, and is in aid to Volstead Act. *S. v. Brame*, 632.

3385, 3386. Evidence of knowledge of accused of place liquor was concealed held sufficient. Exception to refusal of court to set aside verdict held sufficient for appeal to Supreme Court. *S. v. Snipes*, 743.

3465. The question of duty of railroad to furnish employee with a truck to handle trunks, and of assumption of risks, a question for jury under the evidence in this case. *Hines v. R. R.*, 72.

3467. Contributory negligence requires an apportionment of liability, and is not a complete defense for employer. *Moore v. R. R.*, 189.

CONSOLIDATED STATUTES—*Continued.*
SEC.

3467, 3468. In cases coming within these provisions as to logging roads, a nonsuit may not be granted. *Craig v. Lumber Co.*, 560.

3767 *et seq.* Provisions of these sections are not necessarily inconsistent with our Constitution, Art. V, sec. 6. *R. R. v. McArtan*, 201.

3936. Independent action may not be regarded as a motion in causes when the latter is not before the court. Sec. 4936, not before the court. *Walker v. Odom*, 557.

3967. Section reasonably complied with when holder of negotiable note sues nonresident maker, without the jurisdiction of State courts, and made party to action within thirty days, and in this case provision of note authorizing extension of time to maker is not available to endorsers. *Taylor v. Bridger*, 85.

4171, 4173. Conspiracy committed with deceit and fraud, formerly a felony, now converted into misdemeanor, though punishable more severely than common-law misdemeanor. *S. v. Lewis*, 640.

4610, 4625. Refined technicalities of common-law procedure, in both civil and criminal cases, abolished. *S. v. Hedgecock*, 714.

4613, 4621, 4677. False entry on bank's book to deceive bank examiners is sufficient. Unless motion for bill of particulars made, defendant waives right to information as to parties "to jurors unknown." *Ibid.*

4625. Time defendant carried concealed weapon is not essence of offense charged in indictment. *S. v. Spencer*, 765.

4639, 4640. An indictment charging a greater offense includes a charge of a lesser offense, and it is error for judge to fail to charge upon the lesser offense, when evidence supports it, and is not cured by a verdict of guilty of the greater offense. *S. v. Williams*, 685.

4643. Demurrer to evidence must be made at close of plaintiff's evidence, and after all the evidence. *Nowell v. Basnight*, 142.

4447, 4449. Applies to abandonment of wife before children born. Since appeal the absolute divorce granted the wife is not defense for husband. Section 4449 is in addition to provisions of sec. 4447. Art. II, sec. 4, of Constitution makes it discretionary with Legislature to sentence or imprisonment of husband. *S. v. Faulkner*, 636.

5312, 5327. Pending proceedings to establish drainage district and issue bonds, several years delay will not invalidate the proceedings or nullify the bonds. *Oden v. Bell*, 402.

5530. Enlargement of special school tax territory to take in nonspecial tax territory does not require separate approval of voters of the latter. *Vann v. Comrs.*, 168.

6457. An insurance company is responsible for agent's tort in failing to deliver policy, when within the scope of agent's duties to deliver. *Fox v. Ins. Co.*, 121.

CONSOLIDATED STATUTES—*Continued.*
SEC.

7139, 7140. Obstructing a State sanitary inspector in discharge of his duties falls under the provisions of this action. Judge's directing verdict in this case held error. As to whether mere opprobious language amounts to such resistance, questions of fact for jury under the circumstances. *S. v. Estes*, 752.

7279. An act authorizing a county to erect a hospital and issue bonds upon approval of electorate cannot be maintained under this section when acted upon under a special act with different provisions. *Armstrong v. Comrs.*, 405.

7554, 7557. Judgment in protestants' favor upon disclaimer of half of land claimed by him under his grant: *Held*, no error. *In re Hurley*, 452.

7554, 7557. Where the protestants' right depends upon the location of land under the description of a former entry, the boundary is a question of law, the location of the land an issue of fact, and upon an agreement that the judge should find the fact, his finding is conclusive on appeal when supported by evidence. *Brooks v. Woodruff*, 288.

CONSPIRACY. See Evidence, 9; Criminal Law, 13.

CONSTITUTIONAL LAW. See Corporation Commission, 3; Husband and Wife, 5; Municipal Corporations, 1, 5, 14, 19, 29; Highways, 3; Schools, 2; Statutes, 4; Commerce, 3; Abandonment, 4; Criminal Law, 14, 32; Appeal and Error, 59; Forgery, 1; Intoxicating Liquors, 8.

1. *Constitutional Law—Amendments — Reënacting Clause — Repeal.*—The rule under which a new constitution is construed to supersede a prior constitution does not apply to an amendment which reënacts the former provisions with superadded powers, as in this case, the powers conferred upon the county commissioners to provide for the bridges on its highways, superadding the words that the approval of the Legislature may be by special or general statute. C. S., 3767-3772. *R. R. v. McArtan*, 202.

2. *Constitutional Law—Police Powers—Federal Statutes—Municipal Corporations—Cities and Towns.*—The exercise by the State of its power to provide for the safety of its citizens with respect to grade crossings of its street by a railroad company is within its police powers, and may be exercised by municipal corporations under authority conferred on them, and not being delegated to the National Government, it is not affected by Federal legislation upon interstate commerce or the Federal Transportation Act. *Durham v. R. R.*, 241.

3. *Constitutional Law—Health—Local Laws.*—An act authorizing a certain county to erect a tuberculosis hospital and issue bonds therefor, and provide a tax of eight cents on the $100 valuation of its property for its maintenance, upon the approval of the voters, is both a special and local act and void under our Constitution, Art. II, sec. 2, prohibiting laws of this character appertaining to "health," "sanitation," etc. *Armstrong v. Comrs. of Gaston*, 405.

4. *Same—Hospitals—Tuberculosis—Elections—Ballots—Statutes.*— Where the county commissioners have proceeded under a special local act to submit to its electorate the question of erecting and maintaining a tuberculosis hospital, to issue $150,000 in bonds therefor, and levy an

additional tax of eight cents on the $100 valuation of its property for maintenance, their action thus taken cannot be sustained under the provisions of the general law, C. S., ch. 119, secs. 7279 *et seq.*, authorizing an expenditure for the purpose of not exceeding $100,000, and a maintenance tax not to exceed five cents, the balloting also under the general law differing from that in the special act in requiring separate ballots to be taken in two boxes instead of one. *Proctor v. Comrs.*, 182 N. C., 56, cited and distinguished. *Ibid.*

5. *Same—Bonds—Taxation.*—A special or local act authorizing a county to maintain a tuberculosis hospital being contrary to the provisions of our Constitution, Art. II, sec. 2, its further provisions as to issuing the bonds for its erection and the levy of a special tax for its maintenance, are likewise void. *Ibid.*

6. *Constitutional Law—Statutes—Local Laws—Hospitals—Tuberculosis—County Expenses—Necessaries—Bonds—Taxation.*—While Article II, section 2, of our Constitution has been held not to withdraw from the Legislature power by special legislation to authorize counties, etc., to provide proper revenue for advancing proper governmental purposes, though local in character, the decisions refer to legislation providing proper revenue for recognized and established objects, such as roads, bridges, and the like, and not to those prohibited by our organic law, as where the county under a special local act seeks to establish and maintain a tuberculosis hospital, which is not a necessary county expense; and the legislation being unconstitutional as to its dominant purpose, that part providing for the issuance of bonds and a levy of tax for this purpose is also invalid. *Ibid.*

7. *Constitutional Law—Municipal Corporations—Cities and Towns—Statutes—Depots—Railroads—Bonds—Taxation—Contracts — Trusts.*— A statute authorizing a city to issue its bonds and lend the proceeds of their sale to a railroad company to build a depot within its limits, when the question has been submitted to and approved by its voters, does not contravene the State Constitution, and is valid: as in this case, a bond issue by the city for the purpose and in full conformity with the provisions of the statute, running thirty years at not exceeding 6 per cent interest, under contract with the railroad company for the latter to convey all of its depot and track lands within the city to a trustee in trust, to be reconveyed to the railroad company upon its performance of the terms of the contract, and requiring the railroad company by maintaining a sinking fund to discharge the debt at maturity, with accrued interest, take care of the necessary repairs, and pay the taxes upon the property. *Hudson v. Greensboro*, 502.

8. *Same—Public Interests—Courts—Legislative Discretion — Contracts — Consideration.*—Upon the facts appearing of record on this appeal, *it is held* that the benefits that are expected to accrue to the city by the building and maintenance of a depot is within the scope of the public interest, for a public purpose, and is a valid consideration for the contract, and the question as to its effect upon the financial condition of the city in the uncertain future is one solely addressed to the discretion of the legislative branch of the State Government, and to the city acting in accordance therewith, with which the courts may not interfere. *Ibid.*

CONSTITUTIONAL LAW—*Continued.*

9. *Constitutional Law—Faith and Credit—"Aye" and "No" Vote—Journals—Majority in Affirmative.*—A bill to authorize a county to pledge its faith and credit by issuing bonds for road purposes, and duly ratified, is not invalid for the failure to meet the requirements of Article II, section 14, of the State Constitution, requiring that all bills of this character shall be read three several times in each house of the General Assembly, and pass three several readings on different days by each house respectively, with the "aye" and "no" vote entered on the journals of each house on the second and third readings, by reason of the failure to record on the journal on the second reading in one of the branches of legislation the "no" vote, when it is made to appear from the entries of the names of those voting in the affirmative that a majority of the voters had so voted, the absence of the entries of the names of those voting in the negative showing that there were none. *Leonard v. Comrs. of Surry*, 527.

10. *Constitutional Law—Judgment Permitting Clerk of Court and Sheriff to Revoke Suspended Sentence Held Void.*—Where accused was given a suspended sentence of work on roads for drunkenness, a provision that, if he became drunk again, the clerk of the court and the sheriff on information should put the sentence into execution was void, as a denial of due process of law, since the clerk and the sheriff had no judicial authority. *S. v. Phillips*, 614.

11. *Constitutional Law — Criminal Law — Indictment — Evidence — Fatal Variation.*—It is the constitutional right of the defendant in a criminal action to be convicted, if at all, of the particular offense charged in the bill of indictment; and where he has been indicted for the larceny of an automobile owned by and in the possession of A., and the proof is that B. was such owner, there is a fatal variance between the charge and the proof, upon which a conviction may not be sustained; nor can it be surmised upon the identity of the surname that A. and B. were man and wife, and that B. held the possession as the bailee of A. *S. v. Harbert*, 760.

12. *Same — Nonsuit — Motions — Exceptions—Appeal and Error.*—Where there is a fatal variance between the charge in a bill of indictment and the proof, the defendant may take advantage of it by his exception to the refusal of his motion to nonsuit, and have the error reviewed on appeal. *Ibid.*

13. *Constitutional Law—Intoxicating Liquors—Punishments—Sentence.*—The duration of the sentence for a misdemeanor is within the sound discretion of the trial judge when no limitation is fixed by law; and a sentence of two years imprisonment for violating the prohibition law is not objectionable as a cruel and unusual punishment, prohibited by the Constitution. *S. v. Spencer*, 765.

CONSTITUTION, STATE.

ART.

I, sec. 11. Proper officer of payee bank may only testify that drawer of forged check had no funds on deposit, etc. *S. v. Dixon*, 727.

II, sec. 4. Legislature has discretionary power to impose sentence of imprisonment on husband for abandonment, etc. C. S., 4447. *S. v. Faulkner*, 635.

CONSTITUTION, STATE—*Continued.*
ART.

II, sec. 14. The recording of requisite number of "aye" votes in branch of Legislature does not affect validity of act to pledging State's or county's credit by omission to record "no" vote on journal. *Leonard v. Comrs.*, 527.

II, sec. 29. Act to authorize county to build hospital and issue bonds is a special and local act, and prohibited. *Armstrong v. Comrs.*, 405.

V, Does not apply to tax levied by counties or incorporated cities or towns for general municipal purposes. *Cabe v. Board of Aldermen*, 158.

V, sec. 5. Assessments against property owners for street improvements are not a tax within the meaning of this article. *Tarboro v. Forbes*, 59.

V, sec. 6. Provisions of C. S., 3767 *et seq.*, not necessarily inconsistent with this article. *R. R. v. McArtan*, 202.

VII, sec. 7. Schoolhouses are not necessary expenses, and the issuance of bonds therefor must be submitted to approval of voters of school district. *Jones v. Board of Education*, 303.

VII, sec. 7. Borrowing money for street improvements is for necessary expense. *Brown v. Hillsboro*, 369.

VIII, sec. 1. Preferred stock of a corporation cannot acquire lien superior to that of a mortgage. *Cotton Mills v. Bank*, 7.

X, sec. 6. Wife may recover for personal services rendered to her husband, and for his torts in her action against him. *Roberts v. Roberts*, 566.

CONTENTIONS. See Instructions, 1; Appeal and Error, 15, 46, 50, 53, 65; Criminal Law, 33.

CONTINGENCIES. See Estates, 2, 5, 9.

CONTINGENT REMAINDER. See Estates, 8.

CONTRACTS. See Corporation Commission, 3; Insurance, 6, 7, 10, 13, 17; Corporations, 1; Mortgages, 4; Negligence, 1, 2; Damages, 1; Highways, 2; Infants, 1; Monopolies, 3, 7; Statute of Frauds, 1; Husband and Wife, 1; Carriers, 4; Constitutional Law, 7, 8.

1. *Contracts, Written—Conditions Precedent to its Binding Effect—Parol Evidence.*—The principle upon which a contemporaneous verbal agreement may not be received in evidence to alter, vary or contradict the terms expressed in the contract, as written, applies when by the acts or agreement of the parties the written contract has become binding and enforceable; but where the contract has been written and its validity is made to depend upon the happening of a certain contingency, the principle does not apply, and a parol agreement to this effect may be shown in defense by a party who is sought to be held responsible for the breach of the written conditions. *Building Co. v. Sanders*, 328.

2. *Same.*—Where a written contract of lease and option of purchase of a city lot of land for the purpose of erecting a hotel thereon within a stated period, specifying the rental and other matters included in the

CONTRACTS—*Continued.*

arrangement, has been signed by the parties, and the lessee is sued for a breach thereof, it is competent for him to show in defense to the action, that he and the lessor had previously agreed by parol that the written instrument should become effective and binding only upon his being able to interest certain persons in the building of the hotel, within a certain time, which he had been unable to do. *Ibid.*

3. *Contracts—Parol Evidence—Consideration—Statute of Frauds—Principal and Agent—Vendor and Purchaser.*—Where the general agent of the defendant, an automobile manufacturing company, has entered into a written agreement with the plaintiffs for the sale of its automobiles within certain territory, fixing both the purchase and sales price, giving the defendant the arbitrary right of cancellation at any time, the validity of which is contested in the courts by a former agent, claiming the agency, and the general agent of defendants has induced by parol the plaintiff to continue to represent it under the assurance that the machines for the sales season would be shipped according to orders placed with it, causing a large expenditure of money by plaintiff for advertising, contracts made with salesmen, etc.: *Held*, the parol agreement entered into subsequently to the written one is supported by a sufficient consideration, and is not within the statute of frauds, and is enforceable, notwithstanding the terms of cancellation expressed in the written contract previously made. *Erskine v. Motors Co.*, 479.

4. *Contracts — Unilateral Contracts — Consideration Paid.* — Where the promisee under a unilateral contract has later given a sufficient consideration for the performance of its conditions on the part of the promisor, it relates back to the time of the making of the contract, and renders the promise of the promisor obligatory on him. *Ibid.*

5. *Contracts — Breach — Vendor and Purchaser—Damages.*—Where the manufacturer has fixed, by an enforceable contract of agency, both the purchase and selling price of its local agency for the sale of its automobiles, and has wrongfully breached the same, the measure of the agent's damages is the difference between the contract prices at which the automobiles were sold to him and the retail or market value at the place of delivery of the machines he would otherwise have sold. *Ibid.*

6. *Contracts — Breach — Fraud—Promise—Intent—Damages.*—Where the promisor, by his representations, which he has had no intention of performing, has reasonably induced the promisee to enter into a contract, the intent of the promisor, when shown, is a fraudulent misrepresentation of a subsisting fact, and the promisee may recover such damages as resulted to him from the unlawful breach of the promisor of his obligations assumed by him under the terms of the contract. *Ibid.*

7. *Contracts—Breach—Misrepresentation—Damages.*—Where the promisor has induced the promisee to enter into a contract by promises or representations upon which the latter had a right to rely, and is thereby misled to his prejudice, he may recover the resulting loss. *Ibid.*

CONTRACTS—*Continued.*

8. *Contracts—Consideration—Time—Presumptions.*—The law implies a reasonable time for the performance, duration, and completion of a contract, when not therein agreed upon by the parties. *Ibid.*

9. *Contracts—Parties—Corporations—Damages.*—Upon the agreement of the parties, a contract of agency for the local sales of automobiles was made by the plaintiff with the defendant manufacturer, in the name of the plaintiff, who was later to form a corporation to act as such agent: *Held*, the plaintiff may maintain an action to recover damages for the defendant's breach, it being immaterial under the facts of this case whether the corporation had been formed or not. *Ibid.*

10. *Contracts — Policies — Indemnity — Actions— Beneficiaries—Conditions Precedent.*—The principles upon which the beneficiaries of an indemnity policy may recover against the insurance company cannot have effect against the express terms of the policy, requiring as a condition precedent that no action thereon may be maintained by the beneficiary "unless and until execution against the assured is returned unsatisfied" in an action brought against him; and when the alleged cause of action cannot be maintained against the assured, none can be maintained against the indemnity company that issued the policy. *Small v. Morrison*, 577.

CONTRACTS TO CONVEY. See Deeds and Conveyances, 10, 12; Fires, 1.

CONTRIBUTORY NEGLIGENCE. See Negligence, 1, 2, 13, 17; Demurrer, 4; Railroads, 2, 6.

CONVERSATIONS. See Evidence, 1, 8.

CONVICTIONS. See Homicide, 5; Intoxicating Liquors, 8.

COOPERATIVE MARKETING. See Monopolies, 1.

COPRINCIPAL. See Homicide, 12.

CORPORATIONS. See Corporation Commission, 1, 3, 6; Monopolies, 5; Summons, 2; Contracts, 9; Appeal and Error, 40.

1. *Corporations—Preferred Stock—Contracts—Debtor and Creditor.*—Preferred stock issued by an industrial corporation under the general law confers upon the holders a preference over the common stock, it being ordinarily the right to a fixed dividend to be paid out of the net earnings of the company before any dividend on the common stock is allowed, and frequently including this preference in the distribution of the corporate assets among the shareholders in case of dissolution, etc., the relation thus established between the different classes of stockholders being largely one of contract with the company, subordinate always to statutory or charter provisions controlling the matter. *Cotton Mills v. Bank*, 7.

2. *Same.*—Where preferred shares of stock are issued by an industrial corporation under powers conferred upon it in general terms, the holders may not be regarded as corporate creditors, or given a position superior to such creditors, for they are but a part of the company, and cannot occupy the position both of creditor and debtor towards the company. *Ibid.*

CORPORATIONS—*Continued.*

3. *Same—Preference.*—The holders of preferred stock in an industrial corporation cannot be given a priority over its creditors by contract with the directors acting under general powers, but only by virtue of legislative authority clearly and definitely conferred. *Ibid.*

4. *Same—Liens—Mortgages—Bonds.*—Where an industrial corporation has amended its charter under our general laws, ch. 22, art. 2, passed in pursuance of our Constitution, Art. VIII, sec. 1, etc., and thereunder issues stock preferred over the common stock as to dividends, and the distribution of its assets in case of dissolution, the purchasers of such preferred stock can acquire no lien superior to that of a mortgage bond regularly issued by the corporation, whether such mortgage lien were created before or after the issuance of the preferred stock. *Ibid.*

5. *Corporations — Deeds and Conveyances — Seal — Evidence—Nonsuit—Trials.*—Where a conveyance, purporting upon its face to have been signed by the proper officers of a corporation, is introduced in evidence with the corporate seal attached, the affixing of the seal is prima facie evidence, though not conclusive, that it had been signed by the persons in the capacity designated; and when the validity of the conveyance is attacked upon the ground that the persons whose names appear thereon are not the proper officers, a judgment as of nonsuit is improvidently allowed, especially, as in this case, when there is other evidence tending to show that the proper officers of the corporation had signed as indicated and recited in the conveyance. *Lumber Co. v. Lumber Co.*, 237.

CORPORATION COMMISSION. See Appeal and Error, 1, 3, 35; Municipal Corporations, 16; Railroads, 8.

1. *Corporation Commission — Corporations — Rates of Charges—Tolls—Statutes.*—Including public-service corporations furnishing its customers electricity for power, etc., the Corporation Commission is authorized by statute to fix just and reasonable rates or charges, and when these rates are so fixed, other or lower rates are to be deemed as unjust and unreasonable. C. S., 1035, 1066-7-8, 1083-90, 1097, 1100. *Corporation Com. v. Mfg. Co.*, 17.

2. *Corporation Commission — Rates—Jurisdiction—Judgments—Orders.*—When the Corporation Commission has finally established, under the provisions of the statute, rates to be charged by a public-service corporation for furnishing electrical power, the rates are coextensive with the State's jurisdiction and territory, and conclusively bind all corporations, companies, or persons who are parties to the suit and have been afforded an opportunity to be heard. *Ibid.*

3. *Corporation Commission — Corporations — Rates of Charges — Police Powers — Contracts—Constitutional Law.*—The authority conferred upon the Corporation Commission to establish reasonable and just rates of charges by a public-service corporation for furnishing to its customers electrical power come within the police powers of the State, and contracts previously made are subordinate to the public interest that such rates be reasonable and just, and afford the corporation supplying the service a safe return upon its investment, having proper regard to the public interest that plants of this character should be properly run and maintained. *Ibid.*

CORPORATION COMMISSION—*Continued.*

4. *Same—Commerce—Statutes.*—While the generation of electricity in another State when transported to purchasers in this State may be regarded as interstate commerce, its distribution and sale here is local to the State, permitting the Corporation Commission to establish a just and reasonable rate of charges in conformity with the statutory powers, there being no interfering act of Congress relating to the subject. C. S., 1066. *Ibid.*

5. *Corporation Commission — Statutes—"Transportation"—Distribution—Words and Phrases.*—The word "traffic," used in our statute to confer upon the Corporation Commission the authority to establish just and reasonable rates of charges by certain public-service corporations, includes the transportation and also the sale and distribution of the commodities affected. C. S., 1066. *Ibid.*

6. *Corporation Commission—Corporations—Rates of Charges—Valuation of Plant—Evidence—Tax Valuation.*—Under the provisions of our valid statute, C. S., 1068, the Corporation Commission, in fixing a reasonable and just rate of charges for public-service corporations, may make a fair estimated value of the property presently used, and in relation thereto consider the tax valuation of the plant: *Held*, under the facts of this case, an exception was untenable that the rate fixed was upon the basis of the tax valuation alone. *Ibid.*

7. *Corporation Commission — Rates of Charges — Orders—Judgments—Maximum and Minimum Rates.*—Upon the principle that a finding of fact should be determined according to the law and evidence in the case, *it is held* herein that the word "maximum," used in the order of the Corporation Commission for fixing the rates of charges allowed to the petitioning public-service corporation, was not intended to mean that a descending rate therefrom was to be allowed under the contract set up by the customers or users, but to distinguish it from the word "minimum," which also was used in reference to the subject. *Ibid.*

8. *Corporation Commission—Findings—Judgments—Orders—Just Rates—Inferences—Unjust Rates.*—Under our legislation pertinent and the facts presented by the record on this appeal, the finding by the Corporation Commission that the rates designated by it are reasonable and just, include a finding that all other rates are unreasonable and unjust. *Ibid.*

9. *Corporation Commission — Railroads—Orders—Statutes—Appeal—Exceptions—Waiver.*—Where, according to the statute applicable, the citizens of a town have petitioned the Corporation Commission to require two railroad companies to erect a union station at a junction, and after due hearing and investigation the commission has entered an order requiring the railroad companies to erect the station, from which no appeal was taken; and at the request of the companies based on conditions growing out of the World War, the commission has suspended the effect of its order for several years: *Held*, the order previously entered by the commission was one authorized by valid statutes (C. S., 1041, 1042), and complete and final in its effect, requiring an exception entered within the statutory time to have the matter reviewed by the Court, and the action of the commission in suspending the time of the operating effect of the order, at the rail-

CORPORATION COMMISSION—*Continued.*

roads' request, and in consideration of their financial condition under the circumstances, until such time as these conditions were found by it to have so changed as to make the order unoppressive, was not of such character as to give the railroad companies the statutory right of excepting and appealing from the date of its effectiveness, or relate back to the filing of the original order; and *held further*, under the facts of this appeal the railroad companies had waived their right to have the order reviewed by the Court. *Corporation Com. v. R. R.*, 435.

10. *Corporation Commission — Railroads —Statutes—Remedial Statutes.*— C. S., 1041, 1042, conferring authority upon the Corporation Commission to compel railroad companies to erect stations upon a single line of road, and union stations at junctions, etc., are of a remedial nature, and will be liberally construed by the courts in favor of the exercise of the authority conferred. *Ibid.*

11. *Corporation Commission—Orders—Final Judgments—Mandamus—Railroads—Statutes.*—Where the Corporation Commission has ordered two railroad companies to erect a union depot at a junction after a hearing upon the petition of the citizens of the town, and the railroads have lost or waived their statutory right to appeal, such order is regarded as a final judgment, and mandamus proceedings to compel the enforcement of the final order upon failure of the railroads to except and appeal therefrom is the remedy authorized by the statute applicable. C. S., 1103. *Ibid.*

12. *Corporation Commission—Railroads—Statutes—Mandamus—Recordari—Actions—Consolidated Actions.*—Where the Corporation Commission has ordered two railroad companies to build a union station at their junction, and upon the failure of the railroad companies to except and appeal to the courts under the requirement of the statute, the commission has afterwards refused to send up its record to the courts, and the railroad companies have applied to the Superior Court for a *recordari*, when proceedings for mandamus brought by the commission to enforce its order is therein pending: *Held*, the proceedings under the provisions of the statute should be entitled "State *ex rel.* Corporation Commission against the railroads so acting," etc., and the two causes may be consolidated or heard together on appeal to the Supreme Court, the decision of the one depending upon the decision of the other. *Ibid.*

13. *Corporation Commission—Courts—Records—Appeal—Exceptions—Statutes—Railroads.*—The Corporation Commission is a court of record, C. S., 1023, and it must appear thereon that a railroad company claiming an extension of time to file exception to the commission's order has done so, and no alleged parol agreement for an extension of time will be considered. *Ibid.*

14. *Corporation Commission—Railroads—Orders—Appeal—Notice of Appeal—Agreements.*—The statutory notice of an appeal by a railroad company from an order of the Corporation Commission is mandatory and cannot be extended by the consent of the parties of record. *Ibid.*

CORRECTION. See Equity, 1, 2; Instructions, 10.

1. *Correction of Instruments—Negotiable Instruments—Endorsements—Mutual Mistake—Reformation.*—In an action by the holder of a note against an endorser it may be shown by the defendant that the plaintiff had acquired the note upon the distinct agreement that it was to be without recourse on him, and by the mistake of the parties it had been endorsed by him otherwise. *McRae v. Fox*, 343.

2. *Same—Instructions—Sufficiency of Proof—Equity.*—Where the endorser on a negotiable note defends an action thereon by the holder, on the ground that the latter was to accept the note "without recourse," and by mutual mistake he had otherwise endorsed it by writing his name on the back thereof, and the character of his evidence is fully sufficient to sustain his defense, a charge of the court is not error to the plaintiff's prejudice, that the burden is on the defendant to show his defense by "clear and convincing proof," when taken with the other relevant portions of the charge, construed as a whole, his language necessarily implied, and the jury must have so understood, that it required proof that was "cogent" or "strong," etc. *Ibid.*

CORROBORATION. See Claim and Delivery, 1; Evidence, 29; Criminal Law, 24.

COSTS. See State's Land, 1; Municipal Corporations, 30.

COUNTS. See Criminal Law, 11; Intoxicating Liquors, 1, 8; Indictments, 3; Verdicts, 6.

COUNTIES. See Highways, 1, 5.

COURTS. See Roads and Highways, 1; Actions, 3, 5; Evidence, 6, 21; Verdicts, 4; Probate, 1, 2, 5; Judgments, 2, 7; Mandamus, 2; Jury, 2; Pleadings, 5, 12; Venue, 2; Appeal and Error, 23, 33; Husband and Wife, 1; Discovery, 1; Trials, 1; Corporation Commission, 13; Estates, 12; Summons, 2; Constitutional Law, 8; Criminal Law, 3, 22; Intoxicating Liquors, 2.

1. *Courts—Jurisdiction—Justices' Courts.*—An action against a debtor and the alleged fraudulent purchaser of his goods and effects used in his business, as to the latter is not an action founded upon contract, and for the recovery of personal property or damage of concession thereof a justice of the peace has no jurisdiction when the sum of $125 is the amount involved. *Grocery Co. v. Banks*, 149.

2. *Same—Superior Courts—Fraud—Equities.*—The court of a justice of the peace is without jurisdiction to affirmatively administer an equity; and where the plaintiff has a cause of action at law against one of the defendants, coming within the jurisdiction of the justice's court, and seeks an adjustment of an equity founded on alleged fraudulent transactions with the codefendants, his having brought his action in the Superior Court is the choice of the proper jurisdiction, and the granting by the judge of the Superior Court of the defendant's motion to dismiss for the want of jurisdiction in that court is erroneous. *Ibid.*

3. *Same—Code Procedure—Multiplicity of Suits.*—An action to set aside a sale of partnership assets by a solvent to an insolvent partner, and a sale to another as void against our statute regulating sales of mer-

COURTS—*Continued.*

chandise in bulk, involves an adjudication upon an equity that is not cognizable by a justice of the peace, but only in the Superior Court, where alone the property can be followed and the full rights of the parties administered, and this is in conformity with our Code Procedure requiring that all rights should be administered in one action, or suit, and a multiplicity of suits should be avoided. *Ibid.*

4. *Courts — Jurisdiction—Superior Courts—Equities—Law—Judgments—Remedies.*—Under our Code and Procedure the Superior Court has cognizance of both the legal and equitable remedies, and a creditor may join in one action a proceeding to recover a judgment for the amount of his debt, and another to subject property fraudulently disposed of by his debtor, to the payment thereof, and also may enforce his judgment by *mandamus* in proper cases; and he is not required as a prerequisite to the enforcement of his equitable rights that he must have first obtained his judgment in a separate action. *Ibid.*

5. *Courts — Instructions — Expression of Opinion—Statutes—Evidence—Appeal and Error.*—Where the evidence upon the trial is permissible of more than one construction or different inferences may be drawn therefrom, peremptory instructions directing a verdict thereon in favor of either party to the controversy is an expression of an opinion thereon by the trial judge, forbidden by our statute, and constitutes reversible error. C. S., 564. *R. R. v. Lumber Co.*, 227.

6. *Same — Government—Railroads—Embargo.*—Where there is evidence tending to show that one authoritative division of the United States Railroad Administration during Government control had laid an embargo on shipments, and there is also evidence that the shipment in question was for Government purposes, and should have, as an exception, been received and shipped by the initial carrier under a special permit of another authoritative division of the administration, with further evidence that the cars had been placed and partially loaded for shipment before the special permit had been recalled: *Held*, a peremptory instruction in favor of the railroad administration on the issues as to whether it had lawfully refused to receive the shipments tendered, is in contravention of our statute forbidding the trial judge to express his opinion to the jury upon the weight or credibility of the evidence. C. S., 564. *Ibid.*

7. *Courts—Criminal Terms—Motions in Civil Actions—Notice—Dismissal—Statutes.*—It is required by the provisions of our statute, C. S., 1444, that due notice be given of motions in civil actions to be heard at a criminal term of court, and where the movant has failed to give the statutory notice of his motion, and the Superior Court judge has ordered a dismissal of the action, the judgment will be reversed on appeal. *Dawkins v. Phillips*, 608.

COVENANTS. See Landlord and Tenant, 1.

CREDITORS. See Trusts, 4.

CRIMINAL ACTIONS.

Criminal Actions—Instructions—Prejudice—Intoxicating Liquors—Spirituous Liquors.—An instruction upon a trial for violating our prohibition laws, that it required no more evidence to acquit or convict than

CRIMINAL ACTIONS—*Continued.*

in any other criminal action, is in effect a caution to the jury not to be prejudiced in an action of this kind, and is not erroneous. *S. v. Foster*, 675.

CRIMINAL INTENT. See Intoxicating Liquors, 5.

CRIMINAL LAW. See Constitutional Law, 11; Forgery, 1; Obstructing Justice, 1; Indictment, 1; Instructions, 13; Larceny, 1, 2; Appeal and Error, 41, 48; Homicide, 1, 2; Intoxicating Liquors, 1, 5; Jury, 1; Evidence, 29.

1. *Criminal Law—Fact That One Application for Certiorari Was Designated a Motion and Another a Petition Not Material.*—Where two applications for *certiorari* to a county court to remove into the Supreme Court a judgment and proceedings by which the applicant was held to work on the roads for drunkenness were filed, the fact that one application was designated as a petition and the other as a motion was not material, since it related to the form and not the substance of the application. *S. v. Phillips*, 614.

2. *Criminal Law—Certiorari to Review Judgment That Accused Work Roads Not so Irregular as to Require Dismissal.*—Where a judgment was that the accused should be required to work the roads for six months if again found drunk within the county, and that the clerk of the Superior Court and the sheriff should execute the sentence upon information that the accused was again drunk in the county, a proceeding by *certiorari* to review the judgment and proceedings thereunder by which the accused was held to work the roads, instead of appealing in the usual way, was irregular, but not enough so as to warrant a dismissal. *Ibid.*

3. *Criminal Law—On Ordering Execution of Suspended Sentence, Hearing Should be Had by Court as to Violation of Conditions.*—Where a defendant was given a suspended sentence of six months work on the roads for drunkenness on plea of guilty, an allegation by the State that the condition of suspending the sentence that defendant should not become drunk in the county again was broken, and asking enforcement of the sentence, the judge should have required the defendant to appear for inquiry, and, on finding the allegation true, should have stated his finding in the record, and enforced the sentence or have taken such other course as his finding justified. *Ibid.*

4. *Criminal Law—Accused, Imprisoned Illegally for Violation of Condition of Suspended Sentence, Not to be Discharged.*—Where a person was imprisoned illegally by action of the clerk of the court for violating a condition of a suspended sentence, in pursuance of such power granted the clerk in the sentence, he will not be discharged, but will be released on giving bonds to appear for a hearing before the trial court as to whether the condition was violated. *Ibid.*

5. *Criminal Law—Sentence of Imprisonment in Excess of Legal Time Held Not to Entitle Prisoner to Discharge.*—Where a prisoner was given a suspended sentence of six months work on the roads for drunkenness, and on violation of a condition that he should not get drunk in the county again was illegally imprisoned by the clerk of the court in pursuance of the suspended sentence, the fact that such sentence was contrary to Public-Local Laws 1913, ch. 775, as amended

CRIMINAL LAW—*Continued.*

by Public-Local Laws 1917, ch. 663, restricting the penalty to a term of 60 days, does not entitle the prisoner to be discharged, but the case brought up on *certiorari* will be remanded so that he may be resentenced according to law. *Ibid.*

6. *Criminal Law—Excluding Evidence of Statement of Victim's Wife, Alleged as Made on Recognition of Husband's Knife, Held Not Error.* In a prosecution for assault with a deadly weapon, where defendant claimed that, at the time he struck prosecuting witness with a pick-handle, he was acting in self-defense, witness having a knife in his hand and advancing on him, the State's evidence tended to show that witness had no knife, there was no error in refusing to admit evidence that at some time after the assault wife of witness, when handed a knife, exclaimed, "Lord, that is Herbert's knife" (witness's name being Herbert), where an appreciable time had elapsed after the assault before the remark was made, and it was not part of the *res gestæ*, nor did the evidence show clearly that witness heard the remark.—*S. v. Butler*, 625.

7. *Criminal Law—A Charge is to be Taken as a Whole.*—A charge is to be taken as a whole, and not broken up into disconnected and desultory fragments, and thus considered. *Ibid.*

8. *Criminal Law—Charge to be Considered as a Whole.*—In a prosecution for assault with a deadly weapon, where defendant claimed he acted in self-defense, prosecuting witness having a knife in his hand and advancing on him, where the inference from the charges were that the jury should first inquire whether the assault was made in self-defense or whether unlawfully and wrongfully, and if they found that it was made in self-defense, to acquit, but, if not, they should further inquire as to whether defendant had committed an assault with intent to kill, an instruction that if they found that defendant assaulted witness with a deadly weapon, and that he did so without intent to kill, to return a verdict simply of guilty of an assault with a deadly weapon, and not of one with an intent to kill, was not intended to be segregated from the rest of the charge, and was not misleading. *Ibid.*

9. *Criminal Law—Actions—Consolidation—Indictment.*—The court may order the consolidation of several indictments against the same defendants into one indictment with separate counts as to each offense charged, where all of the counts are for the commission of felonies, or are all for the commission of misdemeanors. *S. v. Lewis*, 640.

10. *Same—Statutes—Misdemeanors.*—C. S., 4171, changes the offense of a conspiracy committed with deceit and fraud formerly punishable by imprisonment in the penitentiary into a misdemeanor, although the punishment is more severe than that prescribed for a misdemeanor at common law. C. S., 4173. *Ibid.*

11. *Same—Counts—Joinder.*—Different counts relating to the same transaction, or to a series of transactions tending to one result, may be joined in one indictment of the same defendants, although the offenses are not the same grade, provided the distinction is observed relating to felonies and misdemeanors. *Ibid.*

12. *Same — Misjoinder — Multiplicity.*—Where there is conviction under counts of an indictment with evidence sufficient that the two defend-

CRIMINAL LAW—*Continued.*

ants were guilty of the offense charged, one as principal and the other as accessory, and the jury has returned a verdict of guilty on each of the counts, each of the defendants is equally guilty; and the exception for misjoinder or multiplicity on the ground that one count was solely against one of the defendants is untenable. *Ibid.*

13. *Criminal Law — Accessory — Conspiracy — Indictment—Evidence—Instructions—Trials.*—Where there are counts in an indictment charging that the two defendants had conspired together to commit the crime alleged, and the evidence tended to show that each was guilty or innocent of the conspiracy, an instruction is proper that if the conspiracy is established they both must be found guilty. *Ibid.*

14. *Criminal Law—Evidence—Dying Declarations—Constitutional Law.*—The principle upon which dying declarations may be received in evidence in criminal cases is not in violation of the defendant's constitutional right to confront his accusers, as they have been admitted from necessity. *S. v. Williams*, 643.

15. *Criminal Law—New Trials—Newly Discovered Evidence.*—Another trial for newly discovered evidence will not be granted in a criminal case, or a motion therefor sustained by the court, on the sole ground that some of the witnesses had since changed from their evidence given upon the trial. *Ibid.*

16. *Criminal Law—Witnesses—Accomplices—Influence of Sheriff—Appeal and Error—Objections and Exceptions.*—Where there is evidence that the defendants and another had accomplished their common purpose in killing the deceased, for whose murder the defendants are being tried, and there is evidence of the other person, theretofore convicted of the murder, that tends mainly, with dying declarations of the deceased, to convict the present defendants of the murder charged, the objection that this witness was peculiarly under the influence of the deputy sheriff in whose custody he had been placed while attending court, should be taken advantage of, if tenable, before the trial court, and will not be entertained when taken for the first time in the Supreme Court. *Ibid.*

17. *Criminal Law—Statutes—Prospective Effect—Prior Offense—Intoxicating Liquors—Spirituous Liquors.*—Where the defendant is being tried under a criminal statute, in this case relating to the prohibition law, he may not be acquitted under the provisions of a later prohibition statute, in effect from and after its ratification, when the offense charged was committed before that time. *S. v. Foster*, 675.

18. *Criminal Law — Indictment — Rape — Evidence — Verdict—Degree of Crime.*—An indictment for a certain offense against the criminal law includes all lesser degrees of the same crime, known to the law; and conviction may be had of the lesser offense when the charge is inclusive of both, C. S., 4640; therefore, on an indictment for rape, when the crime charged includes an assault against the person, and other lesser crimes, the jury may acquit of the felony and find a verdict of guilty of an assault should the evidence warrant such finding. C. S., 4639. *S. v. Williams*, 685.

CRIMINAL LAW—*Continued.*

19. *Same—Instructions—Appeal and Error.*—When upon a trial for rape there is evidence that the defendant accomplished his purpose by overcoming the resistance of the prosecutrix by force and coercing her, with the use of a pistol, to submit to his embraces, it is the duty of the court to charge in favor of the defendant when there is supporting evidence as to the lesser degrees of the crime, *i. e.*, assault with intent, assault with a deadly weapon, assault upon a female, etc., and his failure to do so upon defendant's request or otherwise constitutes reversible error. C. S., 4639, 4640. *Ibid.*

20. *Same—Prejudicial Error.*—The error of the judge in failing to charge with supporting evidence, upon the lesser degree of the crime of rape, under a charge thereof in the indictment, is not cured by the verdict finding that the defendant was guilty of the greater degree of the crime charged in the indictment. C. S., 4639, 4640. *Ibid.*

21. *Criminal Law—Principal and Surety—Appearance Bond—Liability of Surety.*—The liability of a surety on the appearance bond of a defendant bound over to the Superior Court upon order of a municipal court in a criminal action, is a continuing obligation from which neither the principal nor his surety is relieved until the cause is finally disposed of or they are discharged by order of court. *S. v. Hutchins*, 694.

22. *Same—Defendant's Duty to Docket Appeal—Court's Jurisdiction.*—Where the defendant in a criminal action has been bound over to the Superior Court for trial, to which he has appealed, it is his duty to have his case docketed at the next criminal term of the Superior Court, at which it is due, and where he has failed to do so, and the case, subsequently docketed, comes up at a subsequent term for trial, the matter not being jurisdictional, the surety on the appearance bond remains bound thereon until he is released by final judgment or discharged by order of the court. *Ibid.*

23. *Criminal Law — Incendiary — Fires—Evidence—Questions for Jury—Nonsuit.*—Upon a trial of defendant for setting fire to and destroying his stock of merchandise, there was evidence tending to show that the corporation of which the defendant was largely the owner was heavily indebted and insured, and that the fire had occurred about 10:30 p. m. shortly after the defendant had been in the store; that the firemen found the store locked, and that no entrance had been forced except those they had made to enter to fight the fires, and that the merchandise had the odor of kerosene which the defendant could not explain, etc.: *Held*, sufficient upon which to deny the defendant's motion as of nonsuit, and to take the case to the jury. *S. v. Edmonds*, 722.

24. *Criminal Law—Evidence—Corroborative Evidence.*—Where, upon a trial of defendant for setting fire to his own store to get the insurance thereon, there is conflicting evidence of the quantity of the merchandise in the store at the time of the fire, and the defendant has become a bankrupt, it is competent for the solicitor to ask the defendant what had become of the stock of goods with reference to the bankruptcy, for the purpose of impeaching his testimony. *Ibid.*

25. *Criminal Law—Evidence—Motive—Identification.*—While motive for the commission of a crime is not necessary to be directly proved, the existence of the motive may be evidence to show the degree of the crime, and the identity of the culprit. *Ibid.*

CRIMINAL LAW—*Continued.*

26. *Criminal Laws—Bills and Notes—Alteration—Forgery—Instructions—Presumptions—Evidence—Rebuttal.*—Where there is evidence that the one in whose possession a promissory note had been given, forged the payee's name thereon and had it discounted at the bank, and used the money thus obtained, an instruction that if the jury so found the facts beyond a reasonable doubt, it would raise a presumption of the defendant's guilt in forging the name of the endorser and altering the note, which the defendant was required to rebut, is not erroneous. *S. v. Patterson*, 129 N. C., 556, cited and applied. *S. v. Jestes*, 735.

27. *Criminal Law—Assault—Secret Assault—Evidence—Appeal and Error—Prejudicial Error—New Trials.*—Upon the trial for a secret and felonious assault, there was testimony by the prosecutor that while he was plowing his field he had been struck by several spent No. 4 shot, evidently fired from a clump of pines, from which powder smoke issued, whereupon he went to his house and returned with his gun; and for the defendant, a lad, that he had attempted to shoot a dog about at this location, supposing it to be mad, according to instructions theretofore given him by his father, which was strongly corroborated and not contradicted, and did not know he had accidentally shot the prosecutor until he saw him returning with his gun, and was then afraid to tell him of his attempt to shoot the dog, and in consequence of this fear he had left home for several days, when he returned and gave himself up to the officer of the law. There was little or no motive shown for the shooting: *Held*, the testimony of the prosecutor that the boy's father had offered him money not to prosecute his son was reversible error, there being no suggestion that it was made in the presence of the son or with his knowledge; and further *held*, the whole evidence was scarcely sufficient for conviction. *S. v. Goode*, 737.

28. *Criminal Law—Tobacco Barns—Burnings—Statutes—Foot Tracks—Evidence—Identification.*—Upon the trial for the unlawful burning of a tobacco barn, C. S., 4244, there was evidence tending to show the foot tracks of the accused and another at the barn, discovered after the fire; that these two were seen by several drinking together during the night in question, and they were traced by their tracks to a mill that had also been fired the same night; that previously the accused and his companion said that the prosecutor was responsible for the breaking up of their illicit still by the officers at a prior time, and that they would get even with him. There was further evidence that a witness saw the accused and his companion together about 12:30 a. m. of the night in question, and after letting them pass, examined their tracks and found them identical with those traced from the barn destroyed: *Held*, sufficient of the accused's motive in burning the barn and of his identification as the one who set it afire, and to refuse a motion as of nonsuit; and the evidence of the tracks, etc., to the mill was not objectionable as tending to show his guilt of a different offense than the one charged. *S. v. Griffith*, 756.

29. *Criminal Law—Evidence—Appeal and Error.*—Where there is evidence tending to show that the defendant indicted for the unlawful burning of a tobacco barn, and another, were seen drinking together on the night in question, each participating equally in the commission of the unlawful act, it is competent to show that thereafter his companion had fled the State to avoid arrest and trial. *Ibid.*

CRIMINAL LAW—*Continued.*

30. *Criminal Law—Indictment—Evidence—Fatal Variation—Second Indictment.*—Where there is a fatal variance between the charge in the indictment and the proof, as to the ownership of a stolen article, a conviction of the defendant may be had on another indictment properly charging the ownership of the stolen article. *S. v. Harbert*, 761.

31. *Criminal Law—Intoxicating Liquor—Evidence—Circumstances.*—Upon the trial of defendant for having intoxicating liquor in his possession for the purpose of sale, testimony of a witness that defendant had come to his store smelling strongly of whiskey, and seemed nervous, is not objectionable when it is a circumstance in the chain of evidence sufficient to convict him. *S. v. Spencer*, 765.

32. *Criminal Law—Concealed Weapons—Evidence—Incriminatory Evidence—Constitutional Law.*—It is not in contravention of the provisions of our Constitution for the State to require a defendant on trial for carrying a concealed weapon to testify whether he had it in a holster on the occasion concealed under his arm when the defendant had taken the stand to testify in his own behalf, the law as to self-incriminatory evidence not applying under the circumstances. *Ibid.*

33. *Criminal Law—Evidence—Admissions—Instructions—Contentions.*—It is not error for the trial judge to recite in his instructions to the jury as a contention of the State an admission made by defendant that he had carried a concealed weapon, upon his trial for that offense. *Ibid.*

34. *Criminal Law—Concealed Weapons—Evidence—Statutes.*—Time is not the essence of the offense of carrying a concealed weapon, and it may be shown at a previous time to that alleged in the bill. C. S., 4625. *Ibid.*

CROPS. See Evidence, 3; Mortgagor and Mortgagee, 1.

CROSS-EXAMINATION. See False Arrest, 2.

CROSSINGS. See Mandamus, 1; Negligence, 14; Railroads, 6.

CURATIVE STATUTES. See Statutes, 7.

CUTTING TIMBER. See Equity, 3.

DAMAGES. See Municipal Corporations, 2, 18, 21; Infants, 3; Actions, 1; Bills and Notes, 3; Evidence, 3; False Arrest, 2, 3; Government, 3; Monopolies, 3; Navigable Waters, 1; Bills and Notes, 8; Landlord and Tenant, 1; Waters, 1; Contracts, 5, 6, 7, 9.

1. *Damages — Contracts — Torts — Consequential Damages.* — Where the plaintiff claims damages in his action for breach of contract, those recoverable are such as were within the reasonable contemplation of the parties at the time the same was made; and if for a tort thereafter committed arising from the contract through the defendant's negligence in the performance of a public duty it owed the plaintiff, the damages recoverable for the commission of the tort are such as were the direct consequences thereof, and such consequential damages as may be reasonably and ordinarily expected to result from the tort

DAMAGES—*Continued.*

at the time it was committed, under conditions that afforded the defendant a fair and reasonable opportunity of avoiding or preventing the additional damages claimed. *Causey v. Davis*, 155.

2. *Same—Railroad—Train Connections.*—A passanger on a railroad train with ticket purchased to destination on the same road, may not recover damages for failure to reach her destination in time to be with her father at her stepmother's burial, caused by her missing the usual connection *en route*, and her father's temporary absence from home when she arrived when such consequences were not made known by her to the defendant's agent at any time before the injury complained of occurred. *Ibid.*

3. *Same—Actual Damages—Additional Expense.*—In this action by the plaintiff to recover damages caused by the defendant railroad company by delaying the arrival at destination of the plaintiff, a passenger on its train, by its failure to make its usual connection at a station *en route: Held*, the plaintiff can only recover, as damages for the defendant's default in making the connection, such additional cost of the trip as she may thereby reasonably have been required to pay. *Ibid.*

4. *Damages—Diminution—Duty of Party Damaged—Government—Railroads—Election of Remedies.*—Where a shipper has loaded a carload shipment during an embargo placed on shipments during Government control of railroads, and defends the action of the administration to recover demurrage charges, etc., upon the ground that he had the right to ship under a special permit, and alleges a counterclaim for damages, he may not successfully contend that the plaintiff should have unloaded the car and have minimized the damages, when he had forbidden the plaintiff to enter the car and prevented its doing so, having elected to stand upon his initial rights. *R. R. v. Lumber Co.*, 228.

DEATH. See Wills, 2.

DEBT. See Highways, 3, 5.

DEBTOR AND CREDITOR. See Corporations, 1; Assignment for Creditors, 1.

DECEDENT. See Vendor and Purchaser, 1.

DECEIT. See Fraud, 1; Infants, 2; Process, 1; Indictment, 1.

DECISIONS. See Appeal and Error, 12, 25.

DE DONIS. See Deeds and Conveyances, 4.

DEEDS AND CONVEYANCES. See Estates, 1, 13; Evidence, 10; Wills, 1, 2; Advancements, 1; Appeal and Error, 8, 13; Corporations, 5; Equity, 1, 2; Fraud, 2; Mortgagor and Mortgagee, 1; Trusts, 1; Equity, 3.

1. *Deeds and Conveyances—Mortgages—Foreclosure—Estoppel—Parties—Privity—Strangers.*—The owner of lands subject to mortgage conveyed his equity to his wife and children, reserving a life estate. The mortgage was foreclosed and the purchaser subsequently conveyed the land to the original owner for a full consideration and

DEEDS AND CONVEYANCES—*Continued.*

without collusion or fraud: *Held*, the original owner later acquired title through an independent source, and there was no element of estoppel by his deed to his wife and children against his later conveyance to another under whom plaintiff derives title; and the purchaser at the foreclosure sale was a stranger to the owner's prior conveyance to his wife and children. *Jackson v. Mills*, 53.

2. *Deeds and Conveyances—Intent—Interpretation—Ambiguities.*—By the modern rules, technicalities and the placing of the formal parts of a deed must, in their interpretation, give way to the intent of the parties ascertained from the language of the entire instrument, and where the intent is in doubt, resort may sometimes be had to extraneous circumstances surrounding the testator at the time of the execution of the instrument. *Seawell v. Hall*, 80.

3. *Same—Formal Parts—Conveying and Habendum Clauses.*—Under the rule interpreting a deed so that the intent of the parties shall prevail as gathered from the language of the entire instrument, the importance formerly attached to the formal parts giving significance to their placing in the instrument, etc., must be subordinated to this intent when properly ascertained; and where, from the *habendum*, construed with the conveyancing clause, this dominant intent clearly appears, it will be given effect. *Ibid.*

4. *Same—Repugnant Clauses—Title—Fee Simple—Defeasible Fee—De Donis—Statutes.*—In the conveyancing part of a deed an estate to the grantor's grandson "and heirs by his mother and assigns," it appearing that at the time the deed was executed the grantor knew that only the grandson could take thereunder; and in the *habendum* "to their only use and behoof forever": *Held*, there is no repugnancy between these clauses in the deed, and the intent was to convey a fee-simple title to the grandson. The effect of the statute *de donis* upon a fee conditional at common law, and our statute converting a fee tail into a fee-simple estate discussed by ADAMS, J. *Ibid.*

5. *Deeds and Conveyances—Registration—Notice—Mortgages—Judgments—Execution—Sales.*—A sale of land under the execution of a judgment in the due course and practice of the court, and conveyance to the purchaser at the sale, regular in form and sufficiently describing the land, conveys the title superior to that of an unregistered deed from the judgment debtor to another, previously made, no notice, however formal, being sufficient to supply that required by registration; though a mortgage for the balance of the purchase price had been given by the grantee of the debtor, and duly registered before the docketing of the judgment, under the execution of which the conveyance had been made to the purchaser at the sale. C. S., 3309, 3311. *Wimes v. Hufham*, 178.

6. *Deeds and Conveyances—Title—Minors—Intent—Evidence.*—Where the question of the interest of minors in the title to lands is involved in a suit to recover damages for defendants' fraud and deceit in misrepresenting that the fee-simple title was in himself, it is competent for the minor to testify that she had deposited her check with the clerk of the court to redeem her interest, as a fact accomplished; and error, if any, committed by the court in having previously permitted her to testify

DEEDS AND CONVEYANCES—*Continued.*

as to her future intention to sue to recover such interest is rendered harmless. *Currie v. Malloy*, 207.

7. *Deeds and Conveyances—Lost Deeds—Delivery—Registration—Title.*—When a deed has once been delivered its subsequent loss or destruction will not divest the title to the grantee. *Powers v. Murray*, 336.

8. *Same—Evidence.*—If the original deed cannot be produced and it becomes necessary to offer secondary evidence of its contents, such contents must be established by "first-hand knowledge" and not by testimony based upon statements made by third parties; and while such testimony when admissible is not required to be verbally precise, it must be entire as to the substance of the material parts and its legal operation. *Ibid.*

9. *Deeds and Conveyances—Development Companies—Plats—Restrictions—Fee Simple—Title.*—A land development company purchased a large acreage of lands in or adjoining a city, had the same platted into lots and sold and conveyed them to various purchasers, in each deed reserving to itself all rights, privileges and easements upon the said property not expressly granted, without uniform scheme of development by which any of the grantees could insist upon performance of any restrictions contained in the deed to the other purchasers, the same not being for their benefit or in which they could acquire any right. The defendant entered into a valid and binding contract with the plaintiff to purchase the absolute fee-simple title to several of these lots that the plaintiff had bought from the development company, to which the company executed its quit-claim deed, and the defendant set up the lack of plaintiff's title on the ground that there were restrictions in plaintiff's deed from the development company that only residences could be built thereon, etc. The judgment sustaining the validity of the plaintiff's fee-simple title was affirmed on appeal. *Homes Co. v. Falls Co.*, 184 N. C., 426. *Snyder v. Heath*, 362.

10. *Deeds and Conveyances—Contracts to Convey—Description of Land—Sufficiency.*—A contract to convey an established and known tobacco warehouse, by name, it "being the vendor's warehouse and plant, meaning thereby the actual warehouse and storehouse, necessary equipment, furniture, fixtures, platforms, sidings, tracks," known as the Farmers Warehouse, New Bern, N. C., etc., etc., is sufficiently described and identified to constitute a binding agreement to sell and convey, and is not unenforceable by reason of indefiniteness of identification, and when necessary and proper and otherwise enforceable, the courts will order a survey to be made in the enforcement of the contract in the vendee's favor. *Warehouse Co. v. Warehouse Corp.*, 518.

11. *Same — Statute of Frauds — "Signed" — Subscribed.*—The statute of frauds requiring that contracts for the sale of lands, etc., to be enforceable must be in writing, does not require that the writing must be subscribed by the parties, but only that it be signed, and where the description of the lands appears below their signatures, and it clearly appears that this was intended by the parties as a part of the contract, it comes within the intent and meaning of the statute. *Ibid.*

12. *Deeds and Conveyances—Contracts to Convey—Title—Encumbrances—"Owner"—Specific Performance.*—Where the parties to a contract to

DEEDS AND CONVEYANCES—*Continued.*

convey lands recognize the existence of certain mortgage liens thereon, and with the vendor's knowledge of the amounts and provisions made therefor, agree to the conveyance of the equity of redemption, these encumbrances do not fall within the principle that encumbrances in a substantial sum, unknown to the vendee and indeterminate as to amount, will avoid the contract as to his rights; and where it is made to appear before a court of competent jurisdiction that the encumbrance immaterially exceeds the purchase price, or that full and adequate protection can be afforded, or that the vendee will get the title he has contracted to receive, specific performance will be decreed by the Court, with proper provision made for clearing the vendee's title; this being especially insistent where the vendee has gone into possession fully aware of the encumbrances and has been exercising over the property full control as owner. *Ibid.*

13. *Same—Fires.*—The owners of a warehouse for the sale of leaf tobacco contracted to convey the same subject to enumerated liens thereon, with provision that they should not exceed one-half of the value of the property to be afterwards ascertained by a designated method, and the purchase price finally established was within an inappreciable amount of the encumbrances thereon. The lienors gave assurance that they were at all times ready, willing, and able to modify the amounts of their liens, so as to enable the vendor to comply with his contract, with other evidence that the vendee would get an unencumbered fee-simple title, which it would have taken except for a delay caused by the vendor, and pending these conditions the warehouse, etc., was destroyed by fire, without fault on the part of the parties to the contract, while the vendee was in possession, exercising full rights of ownership: *Held*, the contract was enforceable against the vendor, and the vendee is regarded as the owner upon whom the fire loss must fall. *Ibid.*

14. *Deeds and Conveyances—Grants—Boundaries—Exceptions—Burden of Proof—Tenants in Common—Title.*—In proceedings to partition lands, defendant pleaded sole seizin, and title was made to depend upon the location of the *locus in quo* within the boundaries of a grant from the State, from which was excepted certain lands covered by a senior grant: *Held*, the burden was on plaintiff to show by the preponderance of the evidence the location of land and title thereto, which was shifted to defendant upon his contention that the lands were within the exception to the junior grant, the plaintiff's admission of defendant's interest not affecting the question. *Boyd v. Lumber Co.*, 559.

DEED OF TRUST. See Assignment for Creditors, 1.

DEFECTS. See Landlord and Tenant, 1.

DELAY. See Insurance, 5.

DELIBERATION. See Homicide, 7, 9.

DELIVERY. See Bills and Notes, 2; Gifts, 1; Insurance, 2, 4, 5, 7, 17; Deeds and Conveyances, 7; Telegraphs, 1.

DEMURRER. See Evidence, 10, 13, 30; Pleadings, 3, 8, 13; Actions, 3.

1. *Demurrer—Pleadings—Answer—Jurisdiction—Statutes.*—A demurrer to the jurisdiction of the court or that the complaint does not state facts

DEMURRER—*Continued.*

sufficient to constitute a cause of action, may be entered after answer filed, and the principle upon which it is ordinarily required that the answer be first withdrawn with leave of the court before demurring to the complaint, does not apply. C. S., 518. *Cherry v. R. R.*, 90.

2. *Demurrer—Pleadings—Answer—Negligence—Actions—Cause of Action—Proximate Cause.*—The complaint in an action against a railroad company to recover damages for a personal injury, alleged that the plaintiff, nine years of age, at the request of defendant's station agent, took a letter relating to defendant's business, to mail it on a train; and after having done so, and upon returning, stumbled over a pile of cinders that had been left on the edge of the "roadway" by the defendant, in violation of a city ordinance, and was consequently injured by a passing train: *Held*, sufficient to take the case to the jury. *Ibid.*

3. *Demurrer—Pleadings—Answer—Speaking Demurrer.*—Where the defendant, after filing answer, has demurred to the sufficiency of the complaint to state a cause of action, the allegations of the answer may not be invoked as an aid to the demurrer, since a "speaking demurrer" is not permissible, and the allegations of the complaint, regarding them in the light favorable to the plaintiff, will alone be considered. *Ibid.*

4. *Demurrer—Evidence—Pleadings—Contributory Negligence—Burden of Proof.*—Contributory negligence must generally be shown by the defendant pleading it, and a demurrer to the complaint will be overruled when the defendant's negligence is sufficiently alleged and there is no allegation of any matter from which contributory negligence may be legally inferred. *Ibid.*

DEPOTS. See Constitutional Law, 7.

DERAILMENTS. See Negligence, 16.

DESCENT AND DISTRIBUTION. See Judgments, 6.

DESCRIPTION. See Deeds and Conveyances, 10.

DEVICES. See Trademarks, 1.

DEVISE. See Estates, 3, 4; Wills, 5, 6.

DIRECTING VERDICT. See Obstructing Justice, 2.

DIRECTOR GENERAL. See Summons, 1.

DISCHARGE. See Criminal Law, 4, 5.

DISCLAIMER. See State's Land, 1.

DISCOVERY. See Appeal and Error, 39, 40.

Discovery—Examination of Books, etc., of Adverse Party—Statutes—Courts—Jurisdiction.—In this action against a corporation and its selling agent to compel the agent to account for and pay over to the corporation moneys received and unlawfully withheld from it: *Held*, the court having jurisdiction of the parties may order the examination, etc., of the books and papers, C. S., 1823 *et seq.*, and enforce it by decree or appropriate procedure in the cause, though the books

DISCOVERY—*Continued.*

are in the possession of the adverse parties beyond the limits of the State. *Ross v. Robinson*, 548.

DISCRETION. See Appeal and Error, 4, 14; Roads and Highways, 1; Evidence, 21; Pleadings, 12.

DISCRETION OF COURT. See Pleadings, 2, 7; Sales, 1; Appeal and Error, 58.

DISCRIMINATION. See Carriers, 3.

DISMISSAL. See Appeal and Error, 1, 9, 22, 39, 40, 41, 42, 60; Actions, 3; Courts, 7; Criminal Law, 2.

DISTRIBUTION. See Corporation Commission, 5; Wills, 4.

DIVERSION. See Municipal Corporations, 13; Waters, 1.

DIVISION. See Judgments, 1.

DIVORCE. See Husband and Wife, 1.

DOCKETS. See Appeal and Error, 41, 58; Criminal Law, 22.

DOMICILE. See Executors and Administrators, 4.

DRAFT. See Evidence, 5.

DRAINAGE DISTRICTS.

Drainage Districts—Statutes—Bonds.—Proceedings for the establishment of a drainage district, C. S., 5312 *et seq.*, and bonds to be issued therefor, will not be held as defective because further steps were not taken for several years after they had been commenced, the court holding they were still pending, and because of the fact that the engineer and viewers did not file a profile map showing the surface of the ground, bottom grades, etc., at the time of the final report, C. S., 5327, it appearing that this was later done upon order of the board of drainage commissioners, and otherwise the provisions of the statutes had been strictly followed. *Oden v. Bell*, 403.

DRUNKARDS.

Drunkards—Sentence of Imprisonment Exceeding Legal Limit Held Error. Under Public-Local Laws 1913, ch. 775, as amended by Public-Local Laws 1917, ch. 663, making punishment for drunkenness in Yancey County 60 days work on the roads, a sentence of 6 months work on the roads for drunkenness was error. *S. v. Phillips*, 615.

DUE PROCESS. See Municipal Corporations, 19.

DUTY. See Damages, 4; Evidence, 7; Mortgages, 3; Trials, 1; Criminal Law, 22.

DYING DECLARATIONS. See Criminal Law, 14; Homicide, 3.

EASEMENTS. See Waters, 2.

Easements—Adverse User—Issues.—In order to establish an easement over the lands of another for the flowing of water into a draining ditch, it is not only necessary to show a continuance of this user for

EASEMENTS—*Continued.*

twenty years, but that it was continued under a claim of adverse right, and not a permissive user; and an affirmative answer to an issue which does not establish these essential elements necessary to the right of the easement claimed is insufficient. *Perry v. White*, 79.

ELECTIONS. See Damages, 4; Schools, 1, 2; Constitutional Law, 4.

EMBARGO. See Courts, 6; Government, 2, 3.

EMINENT DOMAIN. See Municipal Corporations, 1; Pleadings, 1.

EMPLOYER AND EMPLOYEE. See Railroads, 1; Navigable Waters, 2; Equity, 8; Negligence, 16; Instructions, 8.

1. *Employer and Employee—Master and Servant—Negligence—Railroads—Presumptions—Evidence—Questions for Jury—Trials.*—The ordinary presumption that one who is in possession of his faculties, walking on a railroad track, will step to a place of safety on the approach of the train does not apply to an employee standing on the track absorbed in the performance of a duty he owes to the railroad company; and where the plaintiff's intestate was the head brakeman of the railroad company, and was absorbed in his duties of checking and directing from a list cars being placed by the freight train, to which he was attached, upon the siding to be left at a station, and there is evidence that he was struck and killed by another train of the defendant, passing over the track upon which he was standing; and that the engineer on this train had a clear and unobstructed view, and could have appreciated the condition of the intestate by keeping a proper lookout, in time to have avoided killing him; but that the train had approached without signals or warning, the question of defendant's actionable negligence upon the issue of the last clear chance was for the determination of the jury, and defendant's motion as of nonsuit was erroneously allowed. *Moore v. R. R.*, 189.

2. *Employer and Employee—Master and Servant—Railroads—Assumption of Risks—Employers' Liability Act—Statutes—Defenses.*—Under the provisions of the "Employers' Liability Act," C. S., 3467, contributory negligence is not a defense in the employee's action against a railroad, but requires an apportionment of liability; and the Federal act has no application where the negligence of a fellow-servant, which the injured one could not have foreseen or expected, was the sole, direct, and immediate cause of the injury. *Ibid.*

3. *Employer and Employee—Master and Servant—Safe Place to Work—Negligence—Evidence—Nonsuit—Trials.*—It is the duty of the employer to furnish his employee at a power-driven plant a reasonably safe place to work and proper tools and appliances to do the work required of him; and evidence tending to show that the employee had his clothes caught in a bolt in the coupling of a swiftly revolving shaft, left projecting one-half inch beyond the coupling flange, not countersunk or protected, as he was returning from opening a window to let in air, according to the custom of employees in the mill, and in the only way provided, thus causing his death, is sufficient to take the case to the jury upon the issue of defendant's actionable negligence, upon his motion as of nonsuit. *Tisdale v. Tanning Co.*, 497.

EMPLOYER AND EMPLOYEE—*Continued.*

4. *Employer and Employee—Negligence—Assumption of Risk—Evidence—Nonsuit—Trials.*—Where the actionable negligence of the defendant is the proximate cause of the employee's injury, resulting in his death, the doctrine of assumption of risk does not bar the plaintiff's recovery. This and contributory negligence being matters of defense are not available to defendant in his motion as of nonsuit upon the evidence. *Ibid.*

5. *Employer and Employee—Master and Servant—Negligence—Assumption of Risks.*—An employee only assumes the ordinary risks incident to his employment, and not those due to his employer's negligence, unless they are so obvious that a man of ordinary prudence would not have continued to work on and incur the attendant risks, a principle equivalent to that of contributory negligence, involving the element of proximate cause. *Wilson v. Lumber Co.*, 571.

6. *Same—Evidence—Nonsuit.*—Upon evidence tending to show that an employee expressed his unwillingness to attempt with insufficient help to move a heavy piece of green timber, and was injured in so doing under the order of the defendant's subforeman without additional help, the employee is not held to have assumed the risk of the negligent act of the subforeman, and defendant's motion as of nonsuit upon the evidence was properly denied. *Ibid.*

EMPLOYER'S LIABILITY ACT. See Employer and Employee, 2.

ENTIRETY. See Estates, 1; Trusts, 4.

ENTRY. See Evidence, 18; State's Land, 1.

EQUITY. See Bills and Notes, 1, 2, 9, 11; Courts, 2, 4; Judgments, 1; Monopolies, 3; Trusts, 1, 4; Correction of Instruments, 2.

1. *Equity—Deeds and Conveyances—Correction of Instruments.*—Where, by mutual mistake of the parties, a grantor of lands has failed to exclude from the conveyance timber standing thereon which he had previously conveyed to another, the grantee of the timber may maintain his suit in equity against the grantee of the land to correct the mistake in his deed. *Roberts v. Massey*, 164.

2. *Equity—Deeds and Conveyances—Correction of Instruments—Notice—Registration.*—The requirement of registration of a deed, etc., to lands to give notice to purchasers, etc., excluding all other notice, however full or complete, applies necessarily to written instruments and not to the equity to reform a deed for the mutual mistake of the parties, which ordinarily rests in parol, and is not capable of registration. *Ibid.*

3. *Same—Timber Deeds—Extension of Cutting Period.*—Where the grantee of lands brings action to recover damages of the defendant for cutting and removing timber therefrom, and the defendant claims this right under an extension of time granted from the common source of title, of which the plaintiff had full notice at the time he had acquired his title, the defendant may avail himself of the equity allowing a correction of the plaintiff's deed for the mutual mistake of the parties. *Ibid.*

EQUITY—*Continued.*

4. *Equity—Fraud—Following of Funds.*—When a man's property has been obtained from him by actionable fraud or covin, the owner can follow and recover it from the wrongdoer as long as he can identify or trace it; and the right attaches not only to the wrongdoer himself, but to any one to whom the property has been transferred otherwise than in good faith and for a valuable consideration, and this applies not only to specific property, but to money and choses in action. *Bank v. Wagoner*, 297.

5. *Same—Trusts—Implied Trusts.*—The right of the owner of property to follow the property obtained from him by the actionable fraud of another is, upon the equitable doctrine, which in proper instances impresses a trust upon the property and protects and preserves the same for the owner's benefit, to the extent of his interest therein. *Ibid.*

6. *Same—Admixture of Goods.*—Where one has obtained property from the owner by actionable fraud and covin, the application of the principle by which the owner may follow it and impress a trust thereon in his favor in its converted state is not affected by the fact that the person perpetrating the fraud has so commingled it with his own property that it may not be distinguished, for in such case the equity attaches to the whole property, it being required that the one who had perpetrated the fraud establish the identity of his own property from the other upon which the trust attaches, for otherwise the loss, if any, must fall upon him. *Ibid.*

7. *Same—Receivers.*—Where equity will impress a trust upon property in the hands of one who has obtained it by fraud or covin, and the property or fund is threatened both by his fraud and insolvency, the principles of equity will justify and call for the appointment of a receiver to take charge of the property and conserve it pending the litigation. C. S., 860. *Ibid.*

8. *Same—Banks and Banking—Employer and Employee—Collusion—False Entries.*—A trading partnership secretly colluded with one employed at a bank as a bookkeeper for him to pay their checks when they had no balance therein and falsify the entries on the books to show a credit, and upon money so obtained from time to time the concern conducted its business, after having paid in a small capital at the start. Upon application of the bank for a receivership, and this condition appearing by affidavit, and being established: *Held*, the property of the partnership, consisting of merchandise, choses in action, etc., was impressed with a trust in the bank's favor, arising from the fraud practiced upon it, and the application for the receiver for the entire property was properly granted in the absence of the proof by the defendants of the identity of their separate property which they had commingled with the other. *Ibid.*

ESCAPE. See Appeals and Error, 41.

ESTATES. See Wills, 1, 2, 5, 6; Trusts, 4.

1. *Estates—Heirs—Fee Simple—Husband and Wife—Entirety—Right of Survivorship—Deeds and Conveyances.*—An estate to a husband and wife for life, and at their death to their heirs: *Held*, the word "heirs" was used in its technical sense as heirs general, and not to mean

ESTATES—*Continued.*

children, carrying the estate in entirety to the husband and wife, under the rule in *Shelley's case;* and under the principle of the right of survivorship, still effective under our law in such cases, and the husband after the death of his wife would take the fee simple, and could make a valid conveyance of the same. *Roberson v. Griffin*, 38.

2. *Estates — Remainders—Contingencies—Vested Interests.*—Whether estates are vested or contingent is with regard to their certainty and to the time they may be enjoyed; and when there is an immediate fixed right of present or future enjoyment an estate is vested, *i. e.*, vested in possession where the right of present enjoyment exists, and in interest where there is a present right of future enjoyment; and a remainder is vested when the estate is definitely fixed so as to remain to a determinate person after the particular estate is spent, the distinguishing characteristic being the present capacity to take effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines. *Ziegler v. Love*, 40.

3. *Estates—Devises—Testator's Son and Children—Tenants in Common.*—Whether vested or contingent, under a devise to the testator's son and to his children or issue, such son and his children or issue take such interest in the testator's estate as they acquire, as tenants in common. *Ibid.*

4. *Estates—Remainders—Devise—Vested Interests.*—A vested remainder passes from the grantor at the time of the creation of the particular estate and vests in the grantee during the continuance of such estate or at the instant of its determination. *Ibid.*

5. *Same—Contingencies—Fee Tail—Statutes—Fee Simple.*—An estate was devised to the testator's wife for life and at her death to one of his sons and his children or issue, but in case he should die childless and without issue, to the testator's heirs in equal degree. There survived at the death of the testator his son designated to take in remainder, who had no child or children for several years after the testator's death, and also several of the testator's children answering the designation of his heirs in equal degree: *Held*, the son designated to take in remainder acquired an estate in fee simple in remainder defeasible upon the happening of the contingency of his dying childless or without issue, which will continue to affect his interest until the estate becomes absolute or the event occurs by which it is to be determined, which event is to be referred to the death of the remainderman, and not to the death of the devisor. *Ibid.*

6. *Same—Remainders—Statutes.*—An estate in remainder to the testator's son "and to his children or issue," there being no child or children of the son until long after the testator's death: *Held*, to create an estate tail at common law, which is converted into a fee-simple by our statute, C. S., 1734; and where there is an ultimate limitation over to persons coming within its terms, the testator's son and his child or issue cannot convey a fee-simple title. *Ibid.*

7. *Estates—Estates Tail—Statute—Fee Simple.*—Assuming that a conveyance to the grantor's grandson "and heirs by his mother and assigns" conveys an estate to the grantee and a particular class of heirs, as

ESTATES—*Continued.*

distinguished from heirs general, the estate so created would have been an estate tail at common law, converted by our statute into a fee simple. *Seawell v. Hall*, 81.

8. *Estates—Fee Tail—Statutes—Fee Simple—Contingent Remainders—Defeasible Fee.*—An estate to testator's daughter N. for life, and to the lawful heirs of her body, creates an estate tail converted by our statute into a fee simple; and a further limitation "and if she should die leaving no heirs, then the lands to return to the G. family," gives N. a fee defeasible upon her death without issue, children, etc., C. S., 1737, and on her death, leaving children surviving, they take an unconditional fee, and can make an absolute conveyance thereof. *Vinson v. Gardner*, 193.

9. *Estates—Contingencies—Sales—Statutes.*—The timber growing upon lands devised to the testator's named daughter for her sole and separate use during her life only, and at her death to such of her children and grandchildren then living as she may have appointed in her will, and upon her failure to have done so, to her children and grandchildren then living, during the life of the daughter, is affected by the contingencies contemplated by C. S., 1744, and amendments of 1923, authorizing a sale for the purpose of reinvestment, etc., upon compliance with its provisions, among other things requiring that those having a vested interest be made parties, the minors and those not *in esse* and who cannot at present be ascertained be made parties by guardian duly appointed. *Midyette v. Lumber Co.*, 423.

10. *Same—Parties—Vested Interests.*—Where such devisee and her living children and grandchildren have brought proceedings to have the timber on the lands affected with contingent interest sold for reinvestment, etc., C. S., 1744, and amendments of 1923, valid objection that no one having a vested interest in the lands had been made a party cannot be sustained. *Poole v. Thompson*, 179 N. C., 44. *Ibid.*

11. *Same—Bonds—Procedure.*—Where an order has been made for the sale of timber growing upon lands affected with contingent interests, the court should also require its commissioner appointed for the sale to give bonds for the preservation and proper application of the proceeds of sale, etc. (Laws 1919, ch. 259); but this provision does not affect the title of the purchaser, who is not required to see to the application of the funds, and the proper order in this respect may be supplied by amendment or supplementary decree. *Ibid.*

12. *Same—Private Sales—Courts.*—Where the provisions of C. S., 1744, and amendments of 1923, have been observed in the sale of lands affected with contingent interest, the commissioner appointed to make the sale may effect the same by private negotiations, subject to the approval of the court, when it is properly made to appear that the best interests of the parties so require. *Ibid.*

13. *Estates—Remainder—Fee Tail—Statutes—Fee Simple—Deeds and Conveyances.*—An estate to H. during her life, with remainder to the testator's son "and his bodily heirs," vests a life estate in the land in H., with an estate tail in remainder to the son, which, under our statute, is converted into a fee simple. C. S., 1734. And upon the falling in of the life estate, the son can convey a good fee-simple title.

ESTATES—*Continued.*

Chamblee v. Broughton, 120 N. C., 170; *Leathers v. Gray*, 101 N. C., 163, cited and distinguished. *Harward v. Edwards*, 604.

ESTATES TAIL. See Estates, 7.

ESTOPPEL. See Deeds and Conveyances, 1; Probate, 5; Waters, 2.

EVIDENCE. See Criminal Law, 6, 13, 14, 18, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34; Homicide, 1, 2, 3, 7, 8, 10, 11, 12; Witnesses, 1; Intoxicating Liquors, 3, 5, 6, 7; Larceny, 1, 2; Constitutional Law, 11; Forgery, 1; Appeal and Error, 6, 10, 13, 17, 21, 24, 30, 37, 43, 44, 52, 54, 55, 63, 64; Corporation Commission, 6; Advancements, 1; Instructions, 1; Negligence, 1, 3, 4, 6, 10, 12, 14, 15, 16; Actions, 1; Bills and Notes, 3, 4, 11; Claim and Delivery, 1; False Arrest, 1, 2; Corporations, 5; Courts, 5; Deeds and Conveyances, 6, 8; Verdicts, 5, 7; Demurrer, 4; Employer and Employee, 1, 3, 4, 6; Fraud, 1; Mandamus, 3; Statute of Frauds, 2; Vendor and Purchaser, 1; Boundaries, 1; Municipal Corporations, 24; Telegraphs, 1.

1. *Evidence—Telephones—Conversations—Identity of Person Spoken to—Hearsay.*—A bystander at a telephone over which another is speaking may testify as to the part of the conversation he has actually heard, in corroboration of the testimony given by the one speaking, when otherwise competent; but he may not, without personal knowledge of the fact when the conversation is denied, give substantive testimony as to the identity of the one spoken to, the same being hearsay. *Lumber Co. v. Askew*, 87.

2. *Evidence—Nonsuit.*—The defendant's motion to nonsuit will not be allowed when regarding the evidence in the light most favorable to the plaintiff, it is sufficient to sustain his alleged cause of action. *Ashford v. Davis*, 89.

3. *Evidence — Conjecture — Damages — Crops— Fertilizer—Verdict—New Trials—Appeal and Error.*—Where defendant tenant sets up a counterclaim for damages, in plaintiff's action to recover rent for farm lands, that plaintiff had failed in his obligation to furnish fertilizer, etc., under the contract of rental: *Held*, the defendant's evidence should be definite, in support of his counterclaim, as to the kind of fertilizer, weather, and other conditions that would affect the raising of the crop, etc., and his testimony otherwise, as to the crop he could have raised had the fertilizer, etc., been furnished, is purely conjectural, and insufficient to sustain a verdict in his favor. *Gulley v. Raynor*, 97.

4. *Evidence—Nonsuit—Trials—Burden of Proof.*—Where there is conflicting evidence upon the material facts at issue in an action, so that men of fair minds may reach a different conclusion thereon, the issues should be submitted to the determination of the jury under proper instructions from the court; and defendant's motion for nonsuit especially should be denied when the burden is upon him to prove the matters set up by him in defense. *Bagging Co. v. Byrd*, 136.

5. *Same—Banks and Banking—Bill of Lading Attached to Draft—Pleas—Payment.*—A local bank received for collection a draft with bill of lading attached against a partnership of which its president was a member, and the president detached the bill of lading from the draft, gave it to his drawee partner, who obtained the goods from the railroad and converted their proceeds to his own use or that of the firm.

EVIDENCE—*Continued.*

A few days thereafter the bank failed, and its president committed suicide. In the drawer's action against the drawee, surviving partner, the evidence was conflicting as to whether the drawee firm had instructed the bank to pay the draft out of the firm's deposit, etc., relied upon as a defense, the burden of proof of which was on the defendant: *Held*, defendant's motion as of nonsuit was improvidently granted and a new trial is ordered on appeal. *Ibid.*

6. *Evidence—Admissions—Appeal and Error—Evidence Confined by Court.* Where there are several defendants in an action to recover the value of the goods the plaintiffs had purchased, with evidence that the defendants had secretly taken the goods from the plaintiffs' premises and had disposed of them, objection to the admissions of one of the defendants cannot be sustained, when it appears that the trial judge had properly restricted the evidence to the one admitting it. *Nowell v. Basnight*, 142.

7. *Same—Duty of Appellant.*—Where the admission of one of the parties on the trial is competent evidence as to the defendant making it, and not as to his codefendant, the latter should request the court to confine it to the one making the admission, when it also affects himself, but no harm was done in this case, as the judge of his own motion did so confine it. *Ibid.*

8. *Evidence—Conversations—Hearsay.*—Testimony of a defendant as to a conversation he had had with a codefendant is incompetent as hearsay when his codefendant is absent from the trial and has not testified. *Ibid.*

9. *Evidence—Conspiracy—Common Design—Exclusion of Evidence—Appeal and Error.*—Where the plaintiffs' action is to recover the value of certain tobacco owned by the plaintiffs, and there is evidence that the defendants acted with a common design or purpose in secretly taking it from the plaintiffs' premises, the relevant testimony of one of them previously taken on written examination before the clerk is competent in corroboration of the witness so examined, and as to all of the defendants, and the exclusion of it by the court as to the appellant could not have been to his prejudice. *Ibid.*

10. *Evidence—Demurrer—Statutes—Waiver.*—In order for the defendants to avail themselves of the provisions of C. S., 567, in demurring to the plaintiffs' evidence on the trial, applicable in criminal cases under the provisions of C. S., 4643, it is necessary for the defendants also to demur after the plaintiffs have closed their case, or it will be construed as a waiver of their right to demur. *Ibid.*

11. *Evidence—Issues—Verdict—Motion Set Aside—Answer to Issue—Appeal and Error—Objections and Exceptions.*—Objection that the evidence on an issue is insufficient to support a verdict adverse to the appellant should be made in apt time during the trial, and exception comes too late after verdict to be considered on appeal. *Roberts v. Massey*, 164.

12. *Evidence—Questions for Jury—Trials—Executors and Administrators—Sales.*—With the consent of the administratrix, concurred in by the heirs at law, the administratrix being one of them, the lands of the decedent were sold by the mortgagee under the power of sale in his

EVIDENCE—*Continued.*

mortgage, in preference to a sale by the administratrix, to acquire assets for the payment of the debts of the estate. The administratrix being the last and highest bidder, took deed to herself individually, paid off the mortgage, and used the residue of the purchase price as assets in her hands as administratrix, afterwards she sold the land for a much larger price. There being conflicting evidence as to whether she had purchased individually or as administratrix: *Held*, in the action of the other heirs at law to recover the excess, it presented an issue of fact for the jury to determine. *Cole v. Reid*, 235.

13. *Evidence—Demurrer—Deeds and Conveyances—Appeal and Error—Dependent Rights.*—Where the rights of defendant judgment creditors of a defendant corporation are dependent upon the validity of the execution of the conveyance of the corporation's land to the plaintiff, and on this point defendant's demurrer to the evidence has been erroneously sustained, the case will be reinstated as to all defendants. *Lumber Co. v. Lumber Co.*, 237.

14. *Evidence—Nonsuit—Motions—Waiver.*—Where the defendant offers evidence after his motion to nonsuit upon the plaintiff's evidence has been refused, he waives his right under his first exception, and the entire evidence, under his second exception, taken at the close of all the evidence, will be considered on appeal. *Gentry v. Utilities Co.*, 285.

15. *Evidence—Res Ipsa Loquitur—Nonsuit.*—In order for the doctrine of *res ipsa loquitur* to apply or make out a prima facie case of negligence against the defendant sufficient to take the case to the jury upon the issue, it is necessary to show that the thing causing the injury was under the defendant's management, or of its servants, at the time; and where the evidence tends only to show that a window which another passenger had raised and left open fell upon the plaintiff's arm, then resting on the sill, and there is no evidence of a defect in the window or fasteners, a judgment as of nonsuit should be allowed. *Saunders v. R. R.*, 289.

16. *Evidence—Defense—Nonsuit—Burden of Proof.*—Where the plaintiff moves for judgment as of nonsuit upon the defendant's evidence tending to show that by mutual mistake he had not endorsed the note sued on "without recourse," the burden of this issue is on the defendant, and the evidence should be taken in the light most favorable to him; and the motion will be denied if so construed, there is sufficient evidence to sustain his defense. *McRae v. Fox*, 343.

17. *Evidence — Handwriting — Witnesses — Nonexperts.*—One who is acquainted with the handwriting of the person supposed to have written the instrument in question from often having seen him write, or from having acquired competent knowledge of his handwriting in some other approved manner, is competent, though a nonexpert in handwriting, to testify as to its genuineness or falsity. *Brown v. Hillsboro*, 368.

18. *Evidence—Municipal Corporations—Cities and Towns—Entries—Records.*—The full entry of the minutes of the board of town commissioners relating to an election called to determine the question of taxation and issuing bonds for improvements, etc., is required to be introduced upon the trial, in order that the court and jury may under-

EVIDENCE—*Continued.*

stand what had been done at the meeting, in passing upon the validity of the corporate acts in question, and the sufficiency of the evidence. *Bailey v. Hassell*, 184 N. C., 450, cited and approved. *Ibid.*

19. *Evidence—Hearsay—Irrelevant.*—Evidence on the trial of an action is properly excluded by the court when it is hearsay or has no relation to the issue. *Ibid.*

20. *Evidence—Municipal Corporations—Cities and Towns—Local Improvements—Petition.*—Where a petition for local improvements has been made to the town commissioners, the question as to whether a certain person has signed is best evidenced by the petition itself; and where it appears to have been signed for a mercantile company by its business manager, it is competent for the witness to show this authority to sign for the company, or the subsequent ratification of his act. *Ibid.*

21. *Evidence—Irrelevant—Answers to Questions—Motions to Strike Out—Courts—Discretion.*—Irrelevant testimony, unresponsive to a question asked by a party of his witness, should be asked to be stricken out by the party at the time, if objected to; and where he has acquiesced by his delay, the matter is within the discretionary power of the trial judge. *Ibid.*

22. *Evidence—Municipal Corporations—Cities and Towns—Property Valuation—Statutes.*—Exception to the submission of appellant's issues that do not arise from the pleadings is untenable on appeal; and *held*, those submitted in this case were clearly sufficient and comprehensive to present every material question in controversy, and not subject to valid exception. *Ibid.*

23. *Evidence—Nonsuit—Trials.*—Upon defendant's motion to nonsuit, the evidence will be considered in the light most favorable to the plaintiffs, with the inferences that may reasonably be drawn therefrom. *Erskine v. Motors Co.*, 480.

24. *Evidence—Nonsuit—Motions—Trials.*—In this action to set aside a sale and transfer of personal property for fraud and false representations, the evidence was sufficient for the determination of the jury, and defendants' motion as of nonsuit thereon should have been denied. *Wentz v. Burton System*, 609.

25. *Evidence—Nonsuit—Trials.*—The evidence on the trial of this action for violating the prohibition law is held sufficient to sustain a conviction, and warrant the refusal of defendant's motion to dismiss the action. *S. v. Whisnant*, 611.

26. *Evidence—Questions for Jury. S. v. Williams*, 635.

27. *Evidence—Intoxicating Liquors—Spirituous Liquors—Homicide—Murder.*—Upon the trial for murder of an officer while attempting to arrest the defendant for violating the prohibition law, testimony as to what the deceased had said before then about wishing that the defendant would sell his land and move away from the community is irrelevant, and properly excluded by the trial judge. *S. v. Sisk*, 696.

28. *Same—Reputation.*—When the defendant is tried for the murder of an officer while arresting him for violating the prohibition law, testimony

EVIDENCE—*Continued.*

as to whether the witness had heard of the deceased holding up people and shooting at them for carrying whiskey in their automobiles is properly excluded as incompetent. *Ibid.*

29. *Evidence—Corroboration—Statements Made by Witness to Others—Criminal Law.*—A witness may corroborate his testimony by testifying that he had made the same statement to other parties, and a defendant in this action for illicit manufacturing of liquor was properly permitted to testify as to the identity of two others who were with him engaged therein, but escaped the officers making the arrest, and then to state that he had told the officers making the arrest that they were present and engaged in the unlawful act. *S. v. Journegan*, 700.

30. *Evidence—Demurrer—Nonsuit.*—Where the defendant in a criminal action demurs to the State's evidence, and upon the overruling of his motion introduces his evidence and again demurs after the close thereof, the entire evidence will be considered in the light most favorable to the prosecution. *S. v. Reagan*, 710.

31. *Evidence—Hearsay—Appeal and Error.*—What an insurance agent said to a clerk or agent on delivering a policy of fire insurance is hearsay when testified to by the clerk, and incompetent as direct evidence; and if there was error in the court's excluding it, the error is cured by the agent afterwards testifying as to what he had said to the clerk. *S. v. Edmonds*, 721.

32. *Evidence — Witnesses — Character—Hearsay.*—A character witness is confined to the general reputation of the person whose character is attacked or supported, in the community in which he lives, depending upon what the witness has heard or learned as to the general opinion of his standing in the community, evidence of this kind being a matter of hearsay. *S. v. Steen*, 768.

33. *Same—Investigation of Character.*—The law-abiding citizens of a town associated themselves together for the purpose of aiding the enforcement of law and order, especially the prohibition law, which was being extensively violated there, and for the purpose employed a detective from another state to investigate and procure evidence for a conviction: *Held*, competent, the testimony of a citizen of the town and a man of high character, who was sent to the community in which the detective resided for the purpose of investigation, and in anticipated attack upon his evidence, that he had made an investigation of the witness's character, and he would say it was good. *Ibid.*

34. *Same—Appeal and Error—Objections and Exceptions.*—The question as to whether a character witness has qualified himself to give his testimony by first saying he knew the general reputation of the person, is not presented on appeal, when no exception has been taken on that ground in the appellant's brief, but only to his answer to the question, after he has stated a proper ground upon which he had based his opinion. *Ibid.*

EXAMINATION. See Appeal and Error, 38, 39; Discovery, 1.

EXCEPTIONS. See Appeal and Error, 31; Statutes, 8; Corporation Commission, 9, 13; Deeds and Conveyances, 14; Intoxicating Liquors, 4; Constitutional Law, 12.

EXCESSIVE DAMAGES. See Appeal and Error, 36.

EXCESSIVE PUNISHMENT. See Criminal Law, 5; Drunkards, 1.

EXECUTION. See Deeds and Conveyances, 5; Trusts, 3.

EXECUTORS AND ADMINISTRATORS. See Evidence, 12; Appeal and Error, 33, 37; Sales, 1.

1. *Executors and Administrators—Account and Settlement—Statutes—Rights of Distributees.*—While our statute, C. S., 150, allows executors and administrators two years within which to settle the decedent's estate, with an extension of time for good cause shown, this does not necessarily give them the two years in which to make settlement when the status of the estate would otherwise permit, and if the estate is so far advanced as to justify it, the executors and administrators may be called on by the beneficiaries to account and pay over within the two years period. C. S., 156. *Snow v. Boylston*, 321.

2. *Same—Use of Home Place—Reasonable Time.*—When it appears from the proper interpretation of a will that the estate of the testatrix, after the payment of small pecuniary legacies, etc., should be equally divided among her three children, and that one of them should have the use of the home place till she could provide a "smaller place" from her share of the estate, and it is properly made to appear that ample funds are in the hands of the executor to pay certain small debts and charges against the estate, remaining unpaid, and that the estate is ready for distribution: *Held*, the right of the daughter to occupy the home place free of rent was only for a reasonable time after the death of the testatrix, having regard to the circumstances presented, the condition of the estate and the time required for its proper settlement, thus affording the daughter a home until from her share she would be in a position to procure a smaller home for herself; and where she has remained in the home place for a longer time than the circumstances would permit, she is properly chargeable with a reasonable rent thereafter. *Ibid.*

3. *Executors and Administrators—Revocation of Letters—Procedure—Motives.*—A motion upon petition to set aside letters of administration of a deceased person, before the clerk of the Superior Court who had granted them, is the proper method. *In re Martin*, 472.

4. *Executors and Administrators—Domicile—Intent.*—Where letters of administration are sought to be set aside for the want of domicile of the deceased in the county of the Superior Court clerk who issued them, upon the ground that the deceased had changed his domicile to another county, the physical living in the latter county by the deceased before his death, without the intent to become domiciled there, is not a change thereof that will authorize the granting of petitioner's motion. *Ibid.*

5. *Same.*—Where the father of a minor son who has taken his son and his family with him to work in another county, without intent to change his domicile, and he has thereafter brought action for damages for the wrongful death in the county he had left, the motion and petition of the defendant in the action to revoke the letters of administration will be denied. *Ibid.*

EXONERATION. See Bills and Notes, 5.

EXPENSES. See Damages, 3; Schools, 2; Constitutional Law, 6; Municipal Corporation, 27.

EXTENSION. See Equity, 3; Insurance, 11; Appeal and Error, 57.

FALSE ARREST.

1. *False Arrest—Imprisonment—Evidence—Nonsuit—Malice.*—In an action to recover damages for false arrest and imprisonment, liability of the defendant arises from an arrest without proper authority, or such abuse of authority that the protection ordinarily afforded by it is withdrawn; and while evidence of malice, in the sense of personal ill-will, may be received on the trial, especially as it may relate to the issue of damages, it is not a determinative element or one necessary to raise an issue to be determined by the jury; and defendant's motion to nonsuit upon the theory that malice was required to be shown is properly refused. *Butler v. Mfg. Co.*, 250.

2. *False Arrest—Imprisonment—Evidence—Witnesses—Cross-examination—Prejudice—Damages—Appeal and Error.*—Where, upon the trial to recover damages in an action for false arrest and imprisonment, the defendant has testified upon the issue of his damages that in consequence he was so injured in character and reputation that he could not hold positions for which his training had fitted him, it is reversible error for the court to exclude testimony in defendant's behalf, tending to show that plaintiff's changes of positions were voluntary on his part, and not caused by the false arrest, etc., and this though the evidence tending to show loss of positions, etc., had been brought out on defendant's cross-examination of plaintiff. The range of cross-examination of a witness to the extent to which a party may contradict his own or the witness of opposing party discussed by HOKE, J. *Ibid.*

3. *False Arrest—Imprisonment—Principal and Agent—Night Watchman—Police—Damages.*—Where, in an action of false arrest and imprisonment the defendant is alleged to have acted through its employee, a night watchman or special policeman on its manufacturing premises, the question of the principal's liability depends upon whether the agent wrongfully, etc., caused the plaintiff's arrest while acting within the scope of his duties on defendant's premises, if such restriction be established. *Ibid.*

FALSE ENTRIES. See Equity, 8; Indictment, 1.

FALSE REPRESENTATIONS. See Insurance, 13, 16, 17.

FEDERAL STATUTES. See Constitutional Law, 2; Navigable Waters, 1; Carriers, 3; Intoxicating Liquors, 2.

FEDERAL TRANSPORTATION ACT. See Commerce, 2; Statutes, 10.

FEE. See Husband and Wife, 3; Estates, 1, 5, 7, 8, 13; Appeal and Error, 8; Deeds and Conveyances, 4, 9.

FEE TAIL. See Estates, 5, 8, 13.

FERTILIZER. See Evidence, 3.

FINAL JUDGMENT. See Appeal and Error, 35; Corporation Commission, 11.

FINDINGS. See Corporation Commission, 8; Boundaries, 1; Appeal and Error, 26, 37; Husband and Wife, 1; Insurance, 16.

FIRES. See Navigable Waters, 1; Deeds and Conveyances, 13; Criminal Law, 23.

1. *Fires—Vendor and Purchaser—Contracts to Convey—Owner.*—Where valuable buildings on real estate for which a bargain of sale is pending are a principal and substantial inducement to the contract of purchase, and are destroyed by fire without the fault of either of the parties, the loss will fall upon the one who is the owner of the property at the time of the fire; and if the negotiations at or before that time have resulted in an enforceable and binding agreement to convey, and there is no express stipulation to the contrary, the proposed vendee or holder of such agreement will be regarded as the owner of the property. *Warehouse Co. v. Warehouse Corp.*, 518.

2. *Same—Vendor's Title.*—Where the vendor, in a contract to convey lands, the buildings on which are a material and substantial inducement for the transaction, are destroyed by fire, is not at the time of the fire in a position to convey the property for the lack of title or legal right thereto, or if the contract is incomplete and unenforceable for any reason, the loss will fall on the vendor, and the vendee may elect to proceed no further in the matter. *Ibid.*

FOOTPRINTS. See Criminal Law, 28.

FORBEARANCE. See Bills and Notes, 5.

FORECLOSURE. See Deeds and Conveyances, 1; Mortgages, 1, 4.

FORGERY. See Criminal Law, 26.

1. *Forgery—Criminal Law—Evidence—Constitutional Law—Banks and Banking.*—Where the defendant is tried for forgery and fraudulently uttering and publishing forged checks, deposited by him with a forwarding bank for collection, the proper officer of the forwarding bank is competent to testify that the checks had accordingly been forwarded to the payer bank, and had been protested for nonpayment and returned, and in corroboration offer the checks in evidence with the notary's certificate of protest; but the proper officer of the payer bank is only competent to testify that the maker of the check had no account there, under the constitutional guarantee that the accused in all criminal actions shall have the right to confront the accuser and witnesses, etc. Const., Art. I, sec. 11. *S. v. Dixon*, 727.

2. *Same.*—The right of the accused in a criminal action to confront the accuser and witnesses extends to his having them present before the jury at the trial, and, under oath, have them testify to matters within their own knowledge, subject to the test of a competent cross-examination. *Ibid.*

3. *Same—Instructions—Appeal and Error—Prejudicial Error.*—Where the indictment charges the defendant with the forgery of checks, and with fraudulently altering and publishing them, it is required that the State show that the checks were falsely made or uttered with a fraudulent intent, and that they were capable of effectuating a fraud;

FORGERY—*Continued.*

and where the evidence upon the trial permits a finding by the jury that the payee of the check endorsed was a fictitious person, it is necessary for the State to show that the endorser, having the check forwarded for collection, himself signed the name of the fictitious person with the intent to defraud; or, if otherwise, that he was unauthorized to sign the maker's name; and an instruction by the court that it could make no difference whether the maker was a real or fictitious person, if the State had satisfied the jury beyond a reasonable doubt that the defendant was the real maker of the checks, is reversible error. *Ibid.*

FORMS OF ACTION. See Infants, 4.

FRAUD. See Insurance, 7, 15; Pleadings, 10; Contracts, 6; Claim and Delivery, 2; Process, 1; Indictment, 1.

1. *Fraud—Deceit—Evidence—Lis Pendens—Actions.*—In an action to recover damages for the defendant's fraud and deceit in inducing the plaintiff to convey his title to his lands in exchange for the defendant's lands when the latter had only title to a part thereof, a suit concerning the matter in dispute, pending in the county, is not effectual as a *lis pendens* against the defendant's positive and unequivocal assertion of title, upon which the plaintiff relied, and which induced him to part with the title to his own lands. *Currie v. Malloy*, 207.

2. *Same—Deeds and Conveyances—Written Instruments.*—Where the defendant has by deceit and fraud induced the plaintiff to convey his lands in exchange for defendant's land, upon delivery of defendant's deed duly executed, containing full warranty of title, the fraud is in the treaty, and the deed being upon its face in accordance with the representations of the defendant, the principle requiring that one afforded full opportunity to read an instrument will be bound by its terms has no effect upon the plaintiff's right to recover. *Ibid.*

FREIGHT. See Navigable Waters, 1.

FRIVOLOUS APPEAL. See Appeal and Error, 40.

GENERAL APPEARANCE. See Process, 2.

GIFTS.

1. *Gifts—Inter Vivos—Constructive Delivery—Intent—Delivery to Third Person.*—It is not necessary to the validity of a gift *inter vivos* that delivery be made directly to the donee, if it is made by the donor to another for him with the dominant intent at the time to pass the title. *Handley v. Warren*, 95.

2. *Same—Judgments — Questions of Law — Questions for Jury — Appeal and Error—Trials.*—The defendant, heir at law of the deceased, abandoned her purpose to caveat his will in favor of the plaintiff, and there was evidence in defendant's behalf that she and the plaintiff agreed with the clerk of the court, with whom the executor had deposited in settlement, moneys belonging to the estate, that each of the parties should be entitled to a half thereof, and that the clerk should invest it for them: *Held*, upon judgment for plaintiff as a matter of law, the evidence, on appeal, will be considered in the light

GIFTS—*Continued.*

most favorable to the defendant; and it was reversible error for the trial judge not to submit the question of a valid delivery of the property to the jury. *Ibid.*

GOODS. See Bills and Notes, 2; Equity, 6.

GOVERNMENT. See Courts, 6; Damages, 4; Municipal Corporations, 12, 18, 21; Monopolies, 2; Pleadings, 4; Summons, 1.

1. *Government—Railroads — Summons — Process — Service — Substituted Agent—Parties.*—An action against the Director General of Railroads, brought prior to 1 March, 1920, should not be dismissed because service had not been made on the substituted agent of the government appointed under the provisions of the transportation act of 1920, there being no time stated in the act in which such substituted agent shall be made a party. *Ashford v. Davis*, 89.

2. *Government—Railroads—Embargo—Special Shipping Permit—Loading —Transportation.*—The placing of a car in position to be loaded by the shipper under a special permit during an embargo laid thereon during Government control as a war measure, and permitting the shipper partially to load it on the car before the special permit has been recalled, is some evidence that the special permit has been authorized; and the partial loading of the car may be considered as the commencement of the shipment and take it out of the purview of a general order by the Railroad Administration thereafter issued prohibiting such shipments during the continuance of the embargo. *R. R. v. Lumber Co.*, 227.

3. *Government—Railroads—Embargo—Loading Cars — Damage.*—Where, under the control of the Government of railroads, as a war measure, a shipper has loaded a car subject to an embargo placed thereon, he may lawfully be required to unload the car at his own expense. *Ibid.*

4. *Government — Railroads — Principal and Agent — Summons — Process.* The courts of this State will take judicial notice that under the provisions of the Federal Transportation Act the President appointed an agent for the management of certain railroad companies in substitution of the powers of the director general of railroads; and an action will not be dismissed as of nonsuit by reason of a summons having been served on the carrier's local agent entitled in the name of the plaintiff against "J. C. Davis, director general and agent," the defendant so named having entered a general appearance accordingly and defended upon the merits of the case. *Wright v. R. R.*, 354.

GRANTS. See Boundaries, 1; Deeds and Conveyances, 14.

HANDWRITING. See Evidence, 17.

HARMLESS ERROR. See Appeal and Error, 6, 18, 45, 47, 54, 55; Instructions, 4; Vendor and Purchaser, 2; Homicide, 12.

HEALTH. See Insurance, 7, 8; Constitutional Law, 3; Statutes, 9; Obstructing Justice, 1.

HEARSAY EVIDENCE. See Evidence, 1, 8, 19, 31, 32; Appeal and Error, 44, 45.

HEIRS. See Estates, 1; Wills, 1, 5.

HIGHWAY COMMISSION. See Pleadings, 4; Highways, 5.

HIGHWAYS.

1. *Highway—Bridges.*—The word "highways" includes within its meaning bridges thereon intended and used as public thoroughfares. *R. R. v. McArtan*, 201.

2. *Same—Counties—Contracts—State Highway Commission—Statutes.*—It is primarily required that a county construct and repair its bridges; and where the board of county commissioners has, with statutory authority, contracted with the State Highway Commission to build a bridge on its public road to be taken over in the State's system of highways, it is the duty of the board of county commissioners to provide the funds necessary for the purpose in the manner provided by law.—*Ibid.*

3. *Same—Taxation—Debt—Constitutional Law.*—The authority conferred by C. S., 3767-3772, upon the board of county commissioners to build, repair, or alter its road and bridges in any way that may seem practicable, and issue bonds or borrow money and issue notes not to exceed actual cost, and to levy sufficient tax on real and personal property to pay interest, and create a sinking fund, is not necessarily inconsistent with the amendment to Article V, section 6, of our State Constitution, excepting from the limitation of 15 cents on the $100 valuation of property a levy on county property for "a special purpose, and with the approval of the General Assembly, which may be done by special or general act," the amendment only adding that the approval may be done by "general act."—*Ibid.*

4. *Same—Legislative Authority.*—Where, with special legislative authority, a board of county commissioners has contracted with the State Highway Commission to build a bridge on a public highway of the county, to be absorbed in the State's system of highways, and for the building of the bridge the county has incurred an indebtedness for which it has afterwards given its notes, exception to taxation levied to meet these notes upon the ground that it required a special act of the Legislature to give them validity is untenable when proceedings for the purpose have been had under the provisions of the general statutes, C. S., 3767-3772. *Ibid.*

5. *Highways—Bridges—Counties—State Highway Commission—Taxation Debt.*—The board of commissioners of a county contracted with the State Highway Commission, with legislative authority, to construct a bridge upon a highway to be included in the State's system of highways, and having incurred this obligation thereafter, issued its notes therefor and the plaintiffs seek to enjoin a tax levied to pay these notes: *Held*, plaintiffs' position that it was unnecessary to create a sinking fund, as the State Highway Commission would repay the expenditure for the bridges, is untenable, and that it was incumbent upon the county commissioners to levy the tax to provide for the payment of the notes, principal and interest, though executed after the obligation under the contract had been incurred. *Ibid.*

HOMICIDE. See Appeal and Error, 51; Evidence, 27.

1. *Homicide—Criminal Law—Malice—Evidence—Appeal and Error.*—The issue of murder in the second degree involving the element of malice,

HOMICIDE—*Continued.*

and on the trial there is evidence that the defendant killed the deceased at a dance in a warehouse where the deceased and another were disturbing the dance by a quarrel, and there is further evidence that the prisoner killed the deceased in self-defense, requiring that the defendant should have been without default in provoking a quarrel with the deceased, it is competent for the defendant to show that he was in charge of the warehouse for the owners to protect it and preserve order, and that he interfered with the quarrel in the performance of a duty, in order to rebut the idea that he was in fault in bringing on the fight, and the element of malice involved in the issue; and where the verdict is guilty upon this issue, the exclusion of this evidence by the court constitutes reversible error. *S. v. Moore*, 637.

2. *Homicide—Criminal Law—Evidence—Character—Substantive Evidence—Appeal and Error.*—Where, upon the trial of a homicide, there is evidence of the bad character of the prosecuting witness, and of the good character of the defendant, a charge of the court that the jury should consider this evidence in relation to the credibility of the testimony of each, constitutes reversible error in confining the evidence of the defendant's good character to the credibility of his testimony, and excluding it as substantive evidence on the issues. *Ibid.*

3. *Homicide—Murder—Dying Declarations—Evidence.*—Upon the trial for murder, the declarations of the deceased that he knew he had been fatally shot and would die from the effects of his wounds, which, after his lingering a few days, resulted in his death, and his stating under these conditions the names of the defendants as his slayers are sufficient as dying declarations to be received as evidence by the testimony of the one to whom he had made them. *S. v. Williams*, 643.

4. *Same — Mentality — Inferences.*—Where, upon the trial for murder, the declarations of the deceased are admissible in evidence as dying declarations, and all the evidence tended to show that he had made them voluntarily and without suggestion, but after lingering a few days he had become unconscious preceding his death, conjectures are not available as a defense that the declarations were made at a time that the condition of the deceased rendered his mind incapable of comprehending his declarations, or that they were drawn from him solely as a result of questions asked him at the time, and were without foundation in truth. *Ibid.*

5. *Same—Verdict—Conviction.*—Where the prisoners on trial for murder have been identified by the competent dying declarations of the deceased as his murderers, and there is evidence that the defendants had a grudge against the deceased, had declared that "they would get him," and the death resulted from a conspiracy they had formed to kill him: *Held*, the evidence was sufficient to sustain a verdict convicting the prisoners of murder in the first degree. *Ibid.*

6. *Homicide—Murder—Implied Malice.*—Upon a trial for murder, malice, in a legal sense, will be implied from a wrongful or intentional killing of another, without lawful excuse or mitigating circumstances. *Ibid.*

7. *Homicide—Murder—Premeditation — Deliberation — Evidence.*—Where there is evidence upon a trial for murder that the deceased pursued the prisoner and accused him of stealing his corn, and rode in the

HOMICIDE—*Continued.*

latter's wagon with him for the purpose of going before a magistrate, and before reaching their destination the prisoner killed the deceased by pistol shots, and his dead body was found along the road where the prisoner had left him, evidence is competent that upon meeting with the deceased he had uncovered the prisoner's wagon body and found therein corn, hay, and whiskey as tending to disclose conditions that would bear upon the questions of premeditation and deliberation intervening between the time of their meeting and that of the homicide, and sustain a verdict of murder in the first degree. *S. v. Miller*, 679.

8. *Homicide—Murder—Self-defense—Evidence.*—Where self-defense is relied upon in the trial for murder, with the prisoner's evidence that he had killed the deceased when the latter had attacked him with a knife, it is competent for the State to show in rebuttal by its witnesses who had examined the body shortly after the homicide that the deceased had no weapon except a pocket knife, which was found closed in the pocket of the deceased. *Ibid.*

9. *Homicide—Murder—Instructions—Premeditation—Deliberation—Cause of Death.*—Where the prisoner has been convicted of murder in the first degree, his exception that the charge failed to instruct the jury that it was necessary for the death to have resulted from the premeditation and deliberation of the prisoner, cannot be sustained, when it appears that the jury was correctly instructed as to the principles of murder in the first degree, that the burden was placed on the State to establish guilt beyond a reasonable doubt, and that the death must have resulted from the preconceived purpose to commit the homicide. *Ibid.*

10. *Homicide—Murder—Instructions—Evidence—Request for Instructions—Appeal and Error—Objections and Exceptions.*—The prisoner, convicted of murder in the first degree, may not sustain an appeal by exception to the charge upon the element of malice on the ground that the principles of law were not applied to every phase of the evidence, where the instructions correctly stated the principles generally applicable, and the prisoner has not offered prayers for special instructions on the subject of his exceptions. *Ibid.*

11. *Homicide—Manslaughter—Malice—Murder—Evidence—Burden of Proof—Justification.*—The unlawful killing of a human being is at least manslaughter, and with the added element of malice it becomes at least murder in the second degree. When the killing with a deadly weapon is shown or admitted, the burden is on the prisoner to show to the satisfaction of the jury such matters as will reduce the offense to manslaughter or excuse the homicide. *Ibid.*

12. *Homicide—Murder—Coprincipals—Self-defense—Evidence—Instructions—Appeal and Error—Harmless Error.*—When a father and his two sons are tried for murder as coprincipals, and the evidence tends to show that the sons had commenced the firing upon the deceased, an officer with warrants for their arrest, resulting in his killing by the father in self-defense, the defense of the father is not available to the sons who had willfully commenced the firing resulting in the death; and an error in an instruction in favor of the sons upon this principle cannot be complained of by them. *S. v. Whitson*, 111 N. C., 695, cited and distinguished. *S. v. Sisk*, 696.

HOSPITALS. See Constitutional Law, 4, 6; Statutes, 9.

HOUSE OF CORRECTION. See Abandonment, 4.

HUSBAND AND WIFE. See Estates, 1; Trusts, 4; Actions, 3; Abandonment, 1; Criminal Law, 6.

1. *Husband and Wife—Alimony Without Divorce—Statutes—Contract of Separation—Assumption of Marital Relations — Courts — Finding of Facts.*—Where it is urged for the defendant upon his wife's application for alimony without divorce, C. S., 1667, that he and his wife had entered into a contract of separation and had not thereafter resumed the marital relation, it is competent for the husband to show the matters he relies upon his defense, but it is for the trial judge to decide the truth of the matter upon all of the evidence, though his findings are not to be received as evidence, by the jury passing upon the issue properly presented to them at the trial of the case. *Moore v. Moore*, 332.

2. *Same—Appeal and Error—Record—Certificate of Probate.*—Where the defendant resists his wife's application for alimony without divorce, C. S., 1667, upon the ground that there was still in effect a valid contract of separation they both had executed, and appeals from an adverse decision of the trial judge hearing the matter, the record on appeal should set out the writing of separation so that the Supreme Court may determine whether it was reasonable, just and fair to the wife, and whether in taking her acknowledgment the officer had properly certified that it was not unreasonable or injurious to her, as the statute requires. C. S., 2515. *Ibid.*

3. *Husband and Wife—"Subsistence"—Alimony—Attorneys' Fees—Statutes—Amendments.*—While the allowance to be made by the judge for the "subsistence" of the wife from the earnings or estate of her husband, under the provisions of C. S., 1667, in her application for alimony without divorce, is not regarded as synonymous with "alimony" and does not in terms include the allowance for attorneys' fees, by recent statutory amendment the court may now allow her attorneys' fees. *Ibid.*

4. *Husband and Wife—Actions—Common Law—Statutes.*—The common-law fiction that the entity of the wife merged by marriage in that of her husband, and that neither may sue the other, is a matter of public policy that it is the province of the Legislature to change by statute, for it may declare what acts shall be contrary to or in keeping with the public policy of the State. *Roberts v. Roberts*, 566.

5. *Same—Torts—Constitutional Law.*—Under the provisions of C. S., 408, 454, 2606 *et seq.*, passed in pursuance of Article X, section 6, of our State Constitution, husband and wife are authorized to contract and deal with their separate property, subject to specific exceptions as if they were unmarried; and by suing alone the wife may recover not only her earnings for personal service, but damages sustained by her in consequence of personal injury or other tort. *Ibid.*

6. *Same—Willful Torts.*—In order for the wife to recover damages for a tort committed by her husband causing her a personal injury, the test of his liability is whether he has committed the breach of a legal

HUSBAND AND WIFE—*Continued.*

duty he owed to her without distinction as to whether the breach was a willful or negligent act. *Ibid.*

7. *Same—Negligence—Automobiles.*—The defendant driving an automobile with his wife and children is liable in tort for his negligent act which causes his wife a personal injury in the wife's action against him, the common-law fiction of a merger of the identity of the wife with that of her husband, and that a recovery may not be had by her in view of their relationship, having been changed by our statutes. C. S., 408, 454, 2606 *et seq.* *Ibid.*

IDENTITY. See Evidence, 1.

IDENTIFICATION. See Criminal Law, 25, 28.

IMPLIED TRUSTS. See Equity, 5.

IMPRISONMENT. See False Arrest, 1, 2, 3; Criminal Law, 4, 5; Drunkards, 1; Abandonment, 4.

IMPROVEMENTS. See Municipal Corporations, 5, 10, 23, 26, 27; Evidence, 20; Partnership, 1.

INCENDIARY. See Criminal Law, 23.

INCOME. See Wills, 5.

INDEBTEDNESS. See Municipal Corporations, 28.

INDEMNITY. See Contracts, 10.

INDICTMENT. See Criminal Law, 9, 13, 18, 30; Constitutional Law, 11; Intoxicating Liquors, 8; Verdicts, 6.

1. *Indictment—False Entries—Fraud and Deceit—Banks—Criminal Law.* Where the indictment charges the employee with making false entries upon the books of the bank in which he was employed, and that it was a corporation existing under the laws of the State of North Carolina, it is not defective for failing to particularize that it was a bank, within the contemplation of the statute under which the indictment had been drawn. *S. v. Hedgecock*, 714.

2. *Same—Persons to Jurors Unknown—Statutes.*—An indictment charging the employee with the indictable offense of making a false entry on the books of a bank for which he was employed need not necessarily specify all those whom he has thereby intended to defraud; and where it has named the officers of the bank and a depositor, "and other persons to the jurors unknown," it is sufficient to show that the false entry was entered to deceive the bank examiners in concealing his defalcation, who were present making an examination of his books, both under the common law and the statute. C. S., 4621, 4677. *Ibid.*

3. *Same—Counts—Verdict.*—Where the indictment charges but the one criminal offense of fraud to deceive "persons to the jurors unknown" in a false entry made by the defendant on the books of the bank, and there is evidence upon the trial as to the identity of those "persons unknown" to the grand jury, finding a true bill, a general verdict of guilty will be sustained. *Ibid.*

INDICTMENT—*Continued.*

4. *Same—Bill of Particulars.*—Where a bank employee is charged with the indictable offense of making false entries upon the books of the bank in fraud or deceit of "other persons to the jurors unknown," the defendant should make his motion to the discretion of the trial judge for a bill of particulars requiring the name of these unknown persons, and his failure to do so will be deemed a waiver of his right. C. S., 4613. *Ibid.*

INFANTS.

1. *Infants—Contracts—Disaffirmance—Void Contracts.*—Concerning personal property, and excluding contracts for necessaries and such contracts as a minor is authorized by statute to make, an infant may during his minority avoid his contracts, and such avoidance, when effected, is irrevocable and renders the contract void *ab initio*. *Morris Plan Co. v. Palmer*, 109.

2. *Same—Torts—Misrepresentations as to Age—Fraud and Deceit.*—The principle upon which an infant may avoid his executory contract rests upon the policy of the law to protect him during his minority from designing persons, etc., and his right to a disaffirmance, though frequently it may be injurious to the other contracting party, is not affected by the fact that he had misrepresented his age, or appeared in maturity to have reached the age of discretion, and relying thereon the other party had entered into the contract he has disaffirmed. *Ibid.*

3. *Same—Damages.*—While an infant may be held responsible in damages for a pure tort unconnected with a contract upon which the law does not render him liable, it is otherwise when he disaffirms a contract of this character, which the policy of the law permits him to disaffirm. *Ibid.*

4. *Same—Actions—Forms of Action.*—Where the damages sought in the action are based upon an executory contract of an infant concerning which it is the policy of the law to render void upon his disaffirmance, the form of the action in alleging the tort of the infant in inducing the other contracting party to enter into the contract by misrepresenting he was of full age, is ineffectual to produce a different result. *Ibid.*

5. *Same—Benefits Retained—Vendor and Purchaser—Consideration Paid.* Where a minor has purchased an automobile truck, paid party for it, mortgaged it to obtain part of the purchase price, and given his notes to the seller secured by chattel mortgage for the balance, and the truck has been seized and sold under the liens: *Held*, the principle which forbids the minor to retain a benefit from his contract after disaffirmance applies, but he may recover the part payment he has made to the purchaser, including that borrowed for the purpose; and the fact that he has received and spent money he has earned in the operation of the truck does not affect the result. *Ibid.*

INHERITANCE. See Wills, 2; Judgments, 6.

INJUNCTION. See Monopolies, 3.

1. *Injunction.*—Where the main purpose of an action is to obtain a permanent injunction, and the evidence raises a serious question as to

INJUNCTION—*Continued.*

the existence of facts which make for plaintiff's rights, and are sufficient to establish it, a preliminary restraining order should be continued to the hearing. *Cab Co. v. Creasman*, 551.

2. *Same—Automobiles — Color — Public Service.*—In plaintiff's action to permanently enjoin the defendant from the use of a device that the plaintiff had adopted for its automobile service furnished to the inhabitants of a city, there was evidence in plaintiff's behalf, upon the hearing, tending to show that the color design for the plaintiff's automobiles was a yellow body with distinctive markings in black that had theretofore not been used in the city, which became well known to the public which patronized the plaintiff's line because of its fair dealings and business methods, and that the methods of its competitors were discriminatory and unfair; that defendant, who had for a long while been running public-service automobiles of a grey color, put into its service two automobiles similar in design to the plaintiff's cars, and of such similar color and markings that the users of the plaintiff's cars were misled, the difference in their appearance being scarcely discernible by ordinary observation. There was evidence in behalf of defendant that yellow was commonly used for automobiles of this character, and was more durable, and that he had no improper designs upon plaintiff's business: *Held*, a serious question was raised as to the defendant's wrongful interference with the plaintiff's rights, and upon its giving a proper bond, the preliminary restraining order should be continued to the hearing upon the issues. *Ibid.*

INQUIRY. See Bills and Notes, 1.

INSOLVENCY. See Assignment for Creditors, 1.

INSTRUCTIONS. See Appeal and Error, 15, 16, 17, 18, 24, 46, 50, 53, 54, 65; Courts, 5; Negligence, 5, 15; Navigable Waters, 3; Correction of Instruments, 2; Obstructing Justice, 2; Municipal Corporations, 29; Forgery, 3; Railroads, 6; Criminal Law, 13, 19, 28, 33; Witnesses, 1; Verdicts, 7; Criminal Actions, 1; Homicide, 9, 10, 12.

1. *Instructions — Evidence — Contentions—Appeal and Error—Objections and Exceptions.*—Exception that an instruction is not sustained by the evidence, and to a statement of the contentions of a party for the lack of evidence, comes too late after verdict to be considered on appeal. *Construction Co. v. R. R.*, 44.

2. *Instructions—Request for Instructions—Appeal and Error.*—An instruction will not be held for error that is sufficient upon the issue, where the appellant has failed to tender proper prayers upon a particular phase of the evidence that he wishes to have reviewed on appeal. *Ibid.*

3. *Instructions—Requests for Instructions—Appeal and Error.*—The refusal of defendant's requested prayers for instruction is not error when the judge has substantially given them in his general charge. *Ashford v. Davis*, 89.

4. *Instructions—Excerpts—Charge Interpreted as a Whole—Appeal and Error—Harmless Error.*—An excerpt in a charge in a personal injury case is not prejudicial error to defendant for leaving out the principle of proximate cause, when it follows a portion thereof which puts the

INSTRUCTIONS—*Continued.*

burden of proof on the plaintiff to establish the various elements necessary to obtain a verdict on the issue of defendant's actionable negligence, and charges the jury that defendant's actionable negligence and defendant's breach of its legal duty must proximately have produced the injury. *Gentry v. Utilities Co.*, 285.

5. *Instructions—Statutes—Appeal and Error.*—Where the trial judge has instructed the jury correctly but generally on the essential features of the cases, the charge will not be held for error upon appellant's exception that he had not explained to the jury the legal principles in conformity with the provisions of C. S., 564, when he has not submitted in apt time correct special prayers for instruction to such effect. *Bank v. Yelverton*, 315.

6. *Instructions—Negligence—Proximate Cause—Appeal and Error.*—The charge of the court must be considered as a whole and will generally be sustained when it embodies the law applicable to the essential features of the case, and where he has repeatedly and unmistakably charged upon the principle of proximate cause, in a negligence case, his omission to have repeated the principle in a portion of the charge will not be held for error as contradictory or misleading to the jury. *Plyler v. R. R.*, 358.

7. *Instructions—Requests—Appeal and Error.*—The refusal of a correct prayer for instruction is not erroneous when by a change of phraseology the trial judge has substantially charged it in his own language without weakening its force. *Wyatt v. Feldspar*, 434.

8. *Instructions—Employer and Employee—Master and Servant—Safe Appliances—Ordinary Care—Appeal and Error.*—An employer is only required to provide his employee a reasonably safe place to work and reasonably safe appliances with which to do it, in the exercise of ordinary care; and an instruction upon the evidence which leaves out the requirement as to ordinary care imposes an absolute duty on the employer to furnish his employee with such place and appliances, and constitute reversible error to his prejudice. *Owen v. Lumber Co.*, 612.

9. *Instructions—Witnesses—Interest—Appeal and Error.*—Where the relatives of the prisoner on trial for murder have testified, an instruction that the jury should receive their testimony with caution and scrutiny is sufficiently explained by his further charge that after such scrutiny they must give it as much credit as the testimony of a disinterested witness if they were satisfied that they were telling the truth. *S. v. Williams*, 645.

10. *Instructions—Excerpts—Corrected Error—Appeal and Error.*—If the trial judge in his charge to the jury has committed error in an excerpt from his charge upon the evidence of a conspiracy to kill, resulting in the death of the deceased, for which the defendants are on trial for murder, in omitting to charge that the jury must find that the accessories were present at the time one of them did the actual killing, such error, if any, is cured by his having previously charged to that effect, the charge being construed as a whole. *Ibid.*

11. *Instructions—Request for Instruction.*—Where the trial judge has correctly charged upon principles of law in addition to those requested by the appellant, it cannot be held as error. *Ibid.*

INSTRUCTIONS—*Continued.*

12. *Same—General Charge.*—The refusal of requested prayers for instruction that have been more succinctly and pointedly incorporated in the general charge cannot be held as error on appeal. *Ibid.*

13. *Instructions—Criminal Law—Reasonable Doubt—Appeal and Error.*—The charge of the trial judge in this criminal action upon the doctrine of reasonable doubt is not subject to valid objection. *S. v. Griffith*, 756.

INSURANCE.

1. *Insurance—Actions—Parties.*—The administrator of the deceased insured is the proper party to bring an action upon contract of insurance making the policy payable to the personal representatives. *Fox v. Ins. Co.*, 121.

2. *Insurance—Principal and Agent—Torts—Delivery of Policy.*—Where the authorized agent of a life insurance company to deliver a policy could have delivered the same during the good health of the applicant, and delays to do so until the applicant is in ill health, and then not entitled to its delivery under his agreement, except for the delay: *Held*, it is for the jury to determine whether it was the unreasonable delay of the insurer's agent that prevented the delivery of the policy during the continued good health of the applicant, and, if so, the insurer was liable to the beneficiaries of the deceased applicant upon the tort of its authorized agent. *Ibid.*

3. *Same—Premiums—Stipulations—Waiver.*—The rules of an insurance company required the prepayment of the premium on a life insurance policy, and provided that upon the acceptance of the applicant by the medical examiner at the head office of the company the policy would be in force. The local agent agreed with the insured that the payment was to be on delivery to him of the policy, upon the same condition, of which change the home office must have had knowledge when it sent the policy to the local agent for delivery: *Held*, the stipulation as to the prepayment of the premium was in favor of the insurer, which it had waived by its conduct. *Ibid.*

4. *Insurance—Principal and Agent—Soliciting Agent—Agent for Delivery—Statutes.*—The soliciting agent of a life insurance company, who is also charged with the duty to deliver the policy to the applicant, is the agent of the company, and makes it liable for its agent's tort in failing to deliver it within a reasonable time after its receipt by him from his principal for that purpose. C. S., 6457. *Ibid.*

5. *Insurance—Principal and Agent—Delay in Delivering Policy—Torts—Questions for Jury—Trials.*—Where a policy of life insurance was to become effective upon the delivery by the local agent to the applicant while he was in continued good health, and after the receipt of the policy by the accredited agent from the home office, the insured has demanded the delivery of the policy and tendered payment of the premium in accordance with the terms of the contract, and the tender has been kept good, the beneficiaries, after the death of the insured, may recover of the insurer the face value of the policy upon the tort of the agent in failing to deliver the policy within a reasonable time, which is for the jury to determine. *Ibid.*

INSURANCE—*Continued.*

6. *Same—Contracts—Consideration—Actions.*—Where a policy of life insurance would have been delivered to the applicant before his death, and have become binding on the company except for the tort of its agent in failing to deliver it within a reasonable time, the action of the beneficiaries after the death of the applicant will not fail on the ground that there was a want of consideration. *Ibid.*

7. *Insurance, Life — Policies—Contracts—Stipulations—Conditions—Good Health—Delivery of Policy—Fraud and Collusion.*—A clause in the application for a policy of life insurance to become a part of the policy contract when issued, that it will be invalid unless the premium shall be paid on its delivery while the applicant is in good health, is executory until delivery of the policy by the company's authorized agent, and is for the purpose of protecting the company in the event the applicant should theretofore, and since the acceptance by the company, become sick or in ill health; and where the policy has been delivered to the insured or his representative and the premium paid to the company's accredited agent, in the absence of collusion or fraud, the policy becomes a binding contract on the company, irrespective of this clause. *Ins. Co. v. Grady*, 348.

8. *Same—Principal and Agent—Ill Health—Notice to Agent.*—Where the application for a policy of life insurance provides that the application therefor shall become a part of the policy when issued, and specifying that the policy would be invalid unless the first premium shall have been paid and the policy delivered to the insured while in good health, it is required of the company's authorized agent to deliver the policy and accept the premium, that he satisfy himself of the good health of the insured before making delivery, and in the absence of fraud and collusion between the insured and the agent, the knowledge of the agent when acting within the scope of the powers entrusted to him, will be imputed to the company, though a direct stipulation to the contrary appears in the policy or the application for the same. *Ibid.*

9. *Same.*—The insured during ill health sent his representative to the local agent of the company to whom the company had, according to custom, sent the policy for its delivery and the collection of the first premium; and informed the company's agent that the insured was in ill health, which afterwards resulted in his death, and the agent unconditionally delivered the policy and collected the premium without inquiry as to the health of the insured at that time. There was a clause in the application for the policy, incorporated in the policy itself, that the validity of the policy contract was conditioned upon the continued good health of the insured and his paying the first premium. There was no evidence of fraud by the insured or collusion by him or his representative with the agent, but to the contrary, and *held*, the knowledge or notice of the agent of the ill health of the insured was imputed to the company, and the unconditional delivery of the policy by the agent under the circumstances rendered the policy binding upon the company, and enforceable. *Ibid.*

10. *Insurance, Life—Policies—Contracts—Premium Notes.*—Policies of life insurance and premium notes given by the insured in connection therewith, upon forms furnished by the companies, are prepared by the insurers; and in case of ambiguity or uncertainty as to the right

INSURANCE—*Continued.*

interpretation, they will be construed more strongly against the insurers, and in favor of the rights of those insured by them. *Underwood v. Ins. Co.*, 538.

11. *Same—Premiums Paid from Reserve Values—Extension Periods—Proportionate Reductions.*—Upon the payment of two years premiums upon a life insurance policy, there were nonforfeiture options with extensions of time of the insurance upon nonpayment of premiums for various lengths of time depending upon the annual premiums theretofore paid, and the insured gave his note upon the company's form for the premium after the second year, with provisions that should the note not be paid at maturity the policy would lapse, with the right of the company to apply any reserve value due the insured to the payment of the then earned premium (not upon the note), "as above provided," reducing the insured value of the property to that extent; *Held*, under the seeming ambiguous provisions of the note, an application of the reserve value by the company to a part payment of the earned premium due the company, proportionately extended the life of the policy, and upon the death of the insured within the time so extended, his beneficiary can recover upon the policy. *Underwood v. Ins. Co.*, 177 N. C., 333, cited and distinguished. *Ibid.*

12. *Same—Insurance Commissioner.*—As to whether the premium notes given in this case were invalid because not submitted to and approved by the Insurance Commissioner is not presented or decided on this appeal. *Ibid.*

13. *Insurance, Life—False Representations—Statutes—Policies—Contracts.* Under the provisions of our statute that all statements or descriptions in an application for a policy of life insurance, or in the policy itself, shall be deemed representations and not warranties, and that a misrepresentation, unless material or fraudulent, will not prevent a recovery, every fact untruly asserted or wrongfully suppressed must be regarded as material if the knowledge or ignorance of it would naturally influence the judgment of the insurer in making the contract, or in estimating the degree and character of the risk, or in fixing the rate of premium. *Ins. Co. v. Box Co.*, 543.

14. *Same.*—In an action to set aside a policy of life insurance for representations that were false, fraudulent, and material, it appeared that the insured had misstated in his application that he had never had spitting of blood, or Spanish influenza, and it appeared that pending the action he had died of tuberculosis: *Held*, the representations of the applicant must be regarded as material, and the policy will be set aside for the false statements regarding them. *Ibid.*

15. *Same—Fraud.*—The existence of actual fraud upon the part of the applicant for a life insurance policy is not necessary to avoid the policy when he has induced the company to issue it by false representations that are material for its consideration in passing upon the risk. *Ibid.*

16. *Insurance, Life—False Representations—Issues—Verdict—Specific Findings—General Findings—Trials.*—Where the jury have found upon distinctive and separate issues, upon the evidence and under the charge of the court, that the applicant for a policy of life insurance

INSURANCE—*Continued.*

has made material misrepresentations that will avoid the policy, and upon a separate issue that the insured had withheld no fact relating to his physical condition or personal history which he should have communicated, the specific finding as to the false representations will not be considered as included in the verdict on the general issue; and were it otherwise, it would not be allowed to affect the result of avoiding the policy. *Ibid.*

17. *Insurance, Life—Policy—Delivery—Premiums—False Representations—Contracts.*—The principle obtaining that the delivery of a policy of life insurance without qualification, upon the payment of the first premium, effects a completed contract of insurance, does not affect the right of the company thereafter to have the policy set aside for fraud or false and material statements made by the applicant as an inducement to the contract. *Ibid.*

INSURANCE COMMISSIONER. See Insurance, 12.

INSURANCE, LIFE. See Insurance.

INTENT. See Deeds and Conveyances, 2, 6; Gifts, 1; Wills, 3, 5; Contracts, 6; Executors and Administrators, 4.

INTEREST. See Judgments, 1; Trusts, 5; Instructions, 9.

INTERLOCUTORY JUDGMENT. See Judgments, 2.

INTERSTATE COMMERCE. See Commerce, 3.

INTERSTATE COMMERCE COMMISSION. See Carriers, 1.

INTERVENER.

Intervener—Attachment—Title—Burden of Proof.—The burden of proof is on the intervener in attachment to show his title to the property attached. *Electric Co. v. Light Plant*, 535.

INTER VIVOS. See Gifts, 1.

INTESTACY. See Wills, 10.

INTOXICATING LIQUORS. See Criminal Actions, 1; Criminal Law, 17, 31; Evidence, 27; Constitutional Law, 13; Verdicts, 2.

1. *Intoxicating Liquors—Spirituous Liquors—Criminal Law—Verdict—Issues—Counts in Indictment—Responsiveness of Verdict.*—Where the defendant is tried for violating our prohibition law, and indicted under the provisions of C. S., 3379, with possession of spirituous liquor for purposes of sale; section 3385, with receiving more than a designated quantity; section 3386, with receiving such liquor more than one quart at a time within fifteen consecutive days; section 3384, with shipping and transporting the same, a verdict upon the evidence "that the defendant is guilty of receiving more liquor than allowed by law, and not guilty of receiving and transporting liquor," is a finding of guilty of violating the provisions of C. S., 3385; and defendant's motion to set aside the verdict as unresponsive to the issues or the counts set out in the bill of indictment, is properly denied. *S. v. Brame*, 631.

INTOXICATING LIQUORS—*Continued.*

2. *Intoxicating Liquor—Spirituous Liquor—Courts—Jurisdiction—Federal Statutes—State Statutes—Conflict of Laws.*—C. S., 3385, is to prohibit the receiving of more than specified quantities of spirituous or malt liquors, and is an aid to the enforcement of the Volstead Act, passed in pursuance of the Eighteenth Amendment to the Constitution of the United States; and the Federal amendment giving concurrent jurisdiction to the Federal and state courts in the enforcement of the prohibition law, does not take from that of the state court the enforcement of a state statute on the subject not in conflict with the Federal statute, whether the state statute was passed before or after the amendment to the Federal Constitution. *Ibid.*

3. *Intoxicating Liquor—Spirituous Liquor—Evidence—Possession—Prima Facie Case.*—Where the defendant is being tried for violating our prohibition law, and there is evidence that a quart of whiskey had been found in a trunk in the defendant's dwelling with some women's clothes, to explain the presence of the clothes in the trunk and to identify the trunk as that of the plaintiff, it is competent for a witness to testify that the defendant was unmarried, but lived there with a woman. *S. v. Foster*, 674.

4. *Intoxicating Liquors—Spirituous Liquors—Possession—Defenses—Exceptions—Proof.*—Where the defendant, charged with the violation of our prohibition law, seeks to defend himself under the provisions of the Turlington Act, allowing the possession of intoxicating liquors in his house for his own purposes, he must plead and show that the liquor was for the purpose allowed by the act. *Ibid.*

5. *Intoxicating Liquors—Spirituous Liquors—Criminal Law—Evidence—Mental Incapacity—Criminal Intent.*—When the defendant is being tried for illicit distilling of whiskey, it may be shown in defense that he was mentally incapacitated from distinguishing between good and evil and could not appreciate the illegal consequences of his act because of mental incapacity; but testimony by a nonexpert, and from his personal observation, to the effect that the defendant did not have mental capacity to operate a still is incompetent and properly excluded. The charge in this case is approved. *S. v. Journegan*, 701.

6. *Intoxicating Liquor — Spirituous Liquor — Evidence—Statutes—Prima Facie Case—Nonsuit—Trials.*—Evidence that large quantities of whiskey were found concealed in the defendant's dwelling and on his premises, that a pathway led from the defendant's house to several stills having the appearance of their recent operation, constitutes prima facie evidence that it was in violation of C. S., 3379, and defendant's motion to dismiss as in case of nonsuit is properly disallowed. *S. v. Potter*, 742.

7. *Intoxicating Liquors — Spirituous Liquors—"Receive"—Statutes—Evidence.*—Considering the language of C. S., 3385, with the history of legislation relating to prohibition, *it is held* that its controlling intent and purpose is to make it unlawful for any person to acquire and take into his possession within the State at any one time or in any one package, spirituous or vinous liquors, etc., in a quantity greater than one quart, without restricting the meaning of the word "receive" to "accepting from another"; and evidence tending to show that the defendant had walked straight to the place where the prohibited

INTOXICATING LIQUORS—*Continued.*

quantity was concealed and taken it from its hiding place, is sufficient to show that he knew it had been hidden there for his benefit, and sustain a conviction. *S. v. Snipes*, 743.

8. *Intoxicating Liquors—Spirituous Liquors—Indictments—Counts—Statutes — Conviction — Constitutional Law.*—Counts in an indictment charging the defendant with violating our prohibition law, first, having liquor in his possession for the purpose of sale; second, with receiving within the State a quantity greater than one quart; third, receiving within the State a package of spirituous liquor in a quantity greater than one quart, do not charge the offense prohibited by C. S., 3386, making it unlawful for any person during the space of fifteen consecutive days to receive such liquors in a quantity or quantities totaling more than one quart; and a verdict under the counts in this indictment of guilty of receiving more than one quart of whiskey in fifteen days is not responsive to the issues, and is a conviction of an offense of which the defendant was not tried, and concerning which a former conviction may not be successfully maintained, and is in contravention of Art. II, secs. 11 and 12, of our State Constitution. *Ibid.*

9. *Same—Appeal and Error—Objections and Exceptions—Briefs—Rules of Court.*—Where the defendant, tried for violating our State prohibition law, has not been indicted under the provisions of C. S., 3386, for receiving within fifteen consecutive days in this State liquors in quantity or quantities totaling more than one quart, but the trial has been proceeded with under other counts, his exception to the court's refusal to set aside a verdict of conviction under C. S., 3386, and to the judgment accordingly entered, is sufficient to bring up the case to the Supreme Court for review; and his brief addressed to the insufficiency of the verdict citing authorities, is a compliance with Supreme Court rules in that respect. *Ibid.*

INTRASTATE. See Commerce, 1, 2.

ISSUES. See Appeal and Error, 6, 23, 43; Easements, 1; Larceny, 2; Evidence, 11; Mandamus, 2; Verdict, 1, 3, 6; Insurance, 16.

1. *Issues.*—Issues must be so framed that the verdict thereon must necessarily conclude the matter, and leave nothing to conjecture. *Perry v. White*, 79.

2. *Same—Appeal and Error—Objections and Exceptions—New Trials.*—Where the court submits, over the appellant's objection, an issue to which the answer is not conclusive, and has refused a proper issue submitted by the appellant, a new trial will be ordered on appeal. *Ibid.*

3. *Issues—Appeal and Error.*—The refusal by the judge of issues tendered by a party to the action is not error when the issues submitted were sufficient to present all the controverted matters in the case. *Ashford v. Davis*, 89.

JOINDER. See Criminal Law, 11.

JOURNALS. See Constitutional Law, 9.

JUDGES. See Boundaries, 1; Trials, 1.

JUDGMENTS. See Appeal and Error, 1, 3, 5, 26, 33, 35; Trusts, 3; Corporation Commission, 2, 7, 8; Mortgages, 5; Courts, 4; Deeds and Conveyances, 5; Gifts, 2; Venue, 5; Pleadings, 10; State's Land, 2; Waters, 2; Claim and Delivery, 2; Constitutional Law, 10; Criminal Law, 2.

1. *Judgments—Consent—Tenants in Common—Commissioner to Sell Land—Division of Land—Interest—Equity—Judgment Set Aside—Procedure.*—Where the action involves the validity of a deed given to an heir at law of the deceased owner of lands, and a division of his other lands among his heirs as tenants in common, and a consent judgment has been entered establishing the validity of the deed and directing a division of the other lands to be made by the grantee heir at law, his report to have the effect of a decree of the court, all parties waiving the right to except: *Held*, upon exception to the report by one of the parties, that the division thus made was inequitable, and upon the finding of the judge that the one appointed was an interested party and had not made division of all of the lands, the consent judgment should be set aside *in toto*, in the exercise of the equitable jurisdiction of the court, and its order referring the matter to the clerk of the court to appoint commissioners to sell, and further proceedings to be had for the division according to the regular proceeding and practice of the court was a proper one. *Edwards v. Sutton*, 102.

2. *Judgments — Consent — Modification — Courts—Interlocutory Orders.*—The principle upon which the court may not modify a consent judgment entered with the approbation of the court, in the absence of fraud or mistake, applies to final judgments, and not to interlocutory orders entered by consent, when they do not infringe upon the rights of the parties. *Fowler v. Winders*, 105.

3. *Same.*—Where there is a dispute between the parties as to the title and the rent one of them should pay to each of the others for a hotel, and a consent order has been entered that the tenant pay rent in a certain monthly amount to the receiver for the furnished hotel, and thereafter it is made to appear that by the legal action of one of the parties the tenant has been compelled to spend money for refurnishing the hotel: *Held*, the consent order was interlocutory, and a subsequent modification did not substantially affect the right of the parties, ordering that the tenant apply the rent money to his expenditures in refurnishing the hotel, and it was permissible for the court to enter it without the consent of the parties, upon requiring the renter to execute a sufficient bond to secure the final judgment. *Ibid.*

4. *Judgments—Conclusions of Law—Matter of Right.*—A judgment is the conclusion of law upon the facts admitted or authoritatively established in the course of a properly constituted suit; and where the ultimate facts have been so ascertained, a correct judgment must follow and be entered thereon as of right. *Lawrence v. Beck*, 196.

5. *Judgments—Consent—Modification.*—A consent judgment is in effect a contract between the parties entered with the consent of the court, and resting upon their agreement it can only be changed by the court with their consent, and is enforced by the court as its judgment in accordance with its terms. *Walker v. Walker*, 380.

6. *Same—Inheritance—New Propositus.*—In proceedings to partition lands the defendants pleaded sole seizin as the only heirs at law of the blood of their grandparents, the original owners, through their mother, and

JUDGMENTS—*Continued.*

in their action to set aside a deed in entireties to their parents from their grandparents, for mutual mistake, and to establish sole seizin in their mother, upon the ground that the conveyance of the land was only intended as an advancement to her and without other consideration, a consent judgment was entered vesting title to a part of the lands in themselves as heirs at law of their mother, and to the other part in their father. The plaintiffs are the children of the father by a second and third marriage, and not of the blood of the original owners: *Held*, the consent judgment shut off the defendants' line of descent from the grandparents and converted the estate into one of purchase by the parties designated in the judgment, establishing thereby a new origin and stock of descent, from whom alone a title could be acquired either by inheritance or purchase. *Ibid.*

7. *Judgments—Orders—Courts—Irrelevant Remarks.*—An incidental and irrelevant statement made by the judge in ordering personal property of an estate in his sound discretion, to be sold at public auction, cannot affect the validity of his order. *In re Brown*, 399.

8. *Judgments — Consent — Principal and Surety—Claim and Delivery—Statutes.*—The principle, applying to ordinary contracts, that a surety is released from liability by an extension of time given to his principal does not apply to a surety on a replevin bond given under the provisions of C. S., 836, where the defendant retains possession of the property the subject of claim and delivery by reason of the bond, and under its conditions, and thereafter a judgment by consent of the parties is entered by the court; and where the consent judgment stays execution for sixty days, and in that time the defendant upon whom the judgment places liability has disposed of the same, the surety remains liable to the extent of his principal's obligation. *Wallace v. Robinson*, 530.

9. *Same—Principal and Agent.*—The sureties on a replevin bond are considered as parties of record within the limits of their obligation, C. S., 836, and by becoming surety they duly constitute their principal, the defendant in the action, as their agent with power to bind them by their compromise or adjustment of the matter in any manner within the ordinary and reasonable purview of the action, and to have the same evidenced, secured, and enforced by final process in the cause; and he is bound by a judgment, entered therein by consent of the parties, though without his knowledge, for the liability therein imposed on his principal to the extent of the undertaking he has signed as such surety. *Ibid.*

JUNCTIONS. See Commerce, 2.

JURISDICTION. See Appeal and Error, 3; Corporation Commission, 2; Courts, 1, 4; Demurrer, 1; Venue, 2; Summons, 2; Discovery, 1; Intoxicating Liquors, 2; Criminal Law, 22.

JURY. See Probate, 4; Appeal and Error, 48; Indictment, 2; Larceny, 1.

1. *Jury—Criminal Law—Special Venire—Qualification—Talesmen.*—Where a juror has been drawn from the jury box by the statutory method, to serve on special venire for the trial of the prisoner for murder, and summoned accordingly by the sheriff, C. S., 2326, an exception to a

JURY—*Continued.*

juror retained by the court that he has served on the jury within the last two years, and that prisoner's challenge of him has been disallowed, is untenable, the provision relating to talesmen not applying in such instances. *S. v. Williams*, 644.

2. *Jurors—Challenging for Cause — Court — Influence.*—A challenge of a juror for cause must be made in open court, and the refusal of the trial judge to entertain it privately, and not in the hearing of the jurors, upon the apprehension that they might be prejudiced by the challenge, is not subject to exception: the findings of fact thereon by the trial judge being conclusive on appeal, and being sufficient to sustain the ruling of the court. *Ibid.*

JUSTICES' COURTS. See Courts, 1.

JUSTIFICATION. See Homicide, 11.

KNOWLEDGE. See Negligence, 11.

LACHES. See Appeal and Error, 20.

LAND. See Judgments, 1; Boundaries, 1; Wills, 6; Deeds and Conveyances, 10.

LANDLORD AND TENANT. See Mortgages, 1; Municipal Corporations, 22; Verdict, 1.

Landlord and Tenant—Defects on Premises—Personal Injury—Covenants to Repair—Leases—Damages.—The tenant cannot hold his landlord liable for personal injuries to himself or his family by reason of defective conditions on the leased premises on which they live, in the absence of his express covenant to repair; and under the general rule applicable a liability of this character will not usually be imputed. The question as to whether a recovery may be had by the tenant under exceptional covenants or circumstances is not presented on this appeal. *Hudson v. Silk Co.*, 342.

LARCENY.

1. *Larceny—Criminal Law—Evidence—Recent Possession—Presumptions—Jury—Trials.*—In an action for the larceny and receiving of an automobile, evidence that the car of the prosecutor had been taken from the place he had left it on the street of one town and within twenty-four hours thereafter was discovered by the prosecutor parked on the streets of a neighboring town with no one in it, but that the defendant had been seen several times walking by the car, watching if not guarding it, by a policeman who had been put upon watch by the prosecutor, and that the prosecutor, upon taking possession of his car found an overcoat therein with a letter in its pocket addressed to the defendant, together with the defendant's admission that the coat and letter were his, is evidence to be considered by the jury on the question whether the defendant was in the actual possession of the car at the time it was restored to the prosecutor. *S. v. Reagan*, 710.

2. *Larceny—Criminal Law—Evidence—Recent Possession—Issues of Fact.* The presumption that the one in whose recent possession a stolen

LARCENY—*Continued.*

article has been found is the thief is not one of law, strictly speaking, but of fact, open to explanation by the one tried for the offense. *Ibid.*

LAWS. See Courts, 4; Judgments, 4; Appeal and Error, 25.

LAW OF THE CASE. See Appeal and Error, 12.

LEASES. See Landlord and Tenant, 1.

LEGISLATIVE POWERS. See Municipal Corporations, 6, 12, 28; Highways, 4; Constitutional Law, 8; Abandonment, 4; Appeal and Error, 59.

LEGISLATURE. See Statutes, 12.

LETTERS. See Probate, 2, 5; Appeal and Error, 37; Executors and Administrators, 3.

LIENS. See Corporations, 4; Mortgagor and Mortgagee, 1; Municipal Corporations, 22; Pleadings, 2.

LIMITATION. See Municipal Corporations, 29.

LIMITATION OF ACTIONS. See Trusts, 4; Pleadings, 11.

LIS PENDENS. See Fraud, 1.

LOCAL LAWS. See Constitutional Law, 3, 6.

LOCATION. See Boundaries, 1.

LOOKOUT. See Railroads, 6.

LOST INSTRUMENTS. See Deeds and Conveyances, 7.

MALICE. See False Arrest, 1; Homicide, 1, 6, 11.

MALICIOUS PURPOSE. See Trademarks, 1.

MANDAMUS. See Appeal and Error, 35; Corporation Commission, 11, 12.

1. *Mandamus—Municipal Corporations—Cities and Towns—Railroads—Crossings.—Mandamus* is the proper remedy for a city to compel a railroad company to observe its ordinance requiring a change from a grade crossing to an underpass of the railroad track with the city streets for the safety of the citizens. *Durham v. R. R.*, 240.

2. *Same — Courts — Chambers — Issues—Questions for Jury—Statutes.*—Under the provisions of C. S., 868, a summons to compel a railroad company to observe a city ordinance requiring it to change its grade crossing with a street to underpass, etc., is returnable before the judge either at chambers or in term, and upon good cause shown he is to determine the facts as well as the law, except where controlling issues of fact are raised, when upon motion of either party it is his duty to continue the action until the issues can be determined by the jury at the next regular term of the court. *Ibid.*

3. *Same—Evidence—Ordinances—Burden of Proof.*—Where, after an investigation of the conditions at a grade crossing of railroad tracks with a city street, the city has determined that the crossing is a

MANDAMUS—*Continued.*

menace to the life, etc., of its citizens, and has passed an ordinance requiring the railroad company to put in an underpass to remedy the conditions, and has proceeded by *mandamus* to compel the railroad company to comply with the ordinance, the introduction of the ordinance at the hearing is prima facie evidence of the necessity thereof, casting the burden upon the railroad company to show that the ordinance was unreasonable or oppressive. *Ibid.*

4. *Same—Pleadings—Questions for Court.*—When the answer and affidavits of a railroad company in *mandamus* proceedings by a city to enforce its ordinance requiring the railroad to change from a grade crossing with its street to an underpass, raises only evidentiary matters on the controlling issues, or as to the extent of the dangerous conditions requiring the change, no issues are raised requiring the intervention of the jury, and the judge before whom the proceedings are returnable will determine the matter. C. S., 868. *Ibid.*

MANSLAUGHTER. See Homicide, 11.

MARRIAGE AND DIVORCE. See Abandonment, 1.

MASTER AND SERVANT. See Employer and Employee, 1, 2, 3, 5; Railroads, 1; Negligence, 16; Instructions, 8.

MATERIAL. See Criminal Law, 1.

MENTAL CAPACITY. See Homicide, 4; Intoxicating Liquors, 5.

MERITORIOUS CASE. See Appeal and Error, 61.

MERITS. See Process, 6.

MESSAGES. See Telegraphs, 1.

MILITIA. See Appeal and Error, 51.

MINORS. See Deeds and Conveyances, 6.

MISDEMEANOR. See Abandonment, 4; Criminal Law, 12; Appeal and Error, 48.

MISJOINDER. See Actions, 3; Criminal Law, 12.

MISREPRESENTATION. See Infants, 2; Contracts, 7.

MODIFICATION. See Judgments, 2, 5; Probate, 1.

MONOPOLIES.

1. *Monopolies — Restraint of Trade — Cooperative Marketing — Trusts — Statutes.*—Laws 1921, ch. 87, known as the Cooperative Marketing Act, is an enabling act whereby an organization among tobacco growers may be formed by the voluntary act of those joining therein for handling the product of its members, to enable them to obtain a fair price therefor without profit to the organization itself, in opposition to any agreement among the manufacturers or others that may have a contrary effect, and under conditions that will keep the public informed of its methods, and control them under governmental supervision when they go beyond a protective policy or become monopolis-

MONOPOLIES—*Continued.*

tic in effect; and the statute, and the organization formed in pursuance thereof, are not objectionable as being in restraint of interstate commerce, or contrary to the law against monopolies or the public policy or Constitution of this State. *Cooperative Assn. v. Jones*, 265.

2. *Same—Lawful Associations—Government Control.*—The agreement to form an association under Laws 1921, ch. 87, known as the Cooperative Marketing Act, becomes binding at once upon its being accepted by the association after incorporation; and the marketing provisions being available only to the members of the association, and the charter of the association being subject to repeal by the Legislature whenever it should become dangerous to the public, and subject to the intervention of the court to prevent monopoly; the association having no capital stock or surplus, nor credit, except as given by statute, which may be withdrawn at any time, and wholly dependent to borrow money in large sums necessary to the carrying out of its plans, under the control of the Federal Reserve Banking System, under such terms as the Federal board deems consistent with the public welfare, which will not permit a monopoly: *Held*, the governmental control thus to be exercised renders the cooperative plan for the protection of its own members incapable of exercise to the extent of a monopoly or restraint of trade prohibited by law. *Ibid.*

3. *Same—Liquidated Damages—Contracts—Breach—Equity — Injunction.* An organization formed under the provisions of Laws 1921, ch. 87, known as the Cooperative Marketing Act, being permitted only to handle the product of its own members without profit, the provisions of the act are valid allowing it to contract with its members for the sole handling of their crops, and upon the breach by a member of this contract, the recovery of liquidated damages and all cost of the action, including premiums for bonds, expenses, and fees, and affording it equitable relief by injunction to prevent the further breach of the contract by a member, and a decree of specific performance; and also allowing, pending the adjudication of such actions, a temporary restraining order against the member upon the filing of a verified complaint showing the breach of the contract, with the filing of sufficient bond. *Ibid.*

4. *Same—Subsidiary Companies.*—Objection to the validity of the Cooperative Marketing Act that an organization of tobacco growers thereunder has formed subsidiary or minor companies to cure tobacco, redry it, and store it, prize it, and get it ready for market, is without merit; the money for such purpose being very small, specifically limited and under a complete system for its return to its members who have contributed it, it being necessary for the association to own or control enough of the facilities to make effective the authorized purposes of its organization. *Ibid.*

5. *Same—Corporations—Charter Period of Existence.* —The provisions in the charter that an association under the provisions of the cooperative marketing act exists for five years, is the same as applies to a period limited for the existence of other corporations formed under other legislative acts, and does not contemplate that the association

MONOPOLIES—*Continued.*

hold over the crops raised in one year for one or more successive years, such being destructive of the purposes of the association as contemplated by the statute. *Ibid.*

6. *Same—Publicity.*—The provision in the Cooperative Marketing Act for the appointment of a director by each of the governors of the three states of Virginia, North Carolina, and South Carolina is not objectionable on the ground that these three directors can control the other twenty-two chosen by the members under the plan outlined in the statute, the purpose therein being that the public may have opportunity to learn at all times how the business is being conducted, and to insure that it will be carried on in a manner that will not be detrimental to the public welfare. *Ibid.*

7. *Same—Contracts—Presumptions of Validity.*—The legal presumption is in favor of the validity of the marketing contract made by a member with the cooperative association, in an action by the latter against the former for its breach, which presumption will only yield when its illegal character plainly appears; and *Held*, in this case there is nothing appearing that would indicate the association proposed to sell the member's tobacco for a greater sum than its true or actual value, or that it was acting in violation of the Anti-trust Law, or in restraint of trade. *Ibid.*

MORTGAGES. See Corporations, 4; Deeds and Conveyances, 1, 5; Bills and Notes, 2; Pleadings, 2.

1. *Mortgages—Foreclosure—Sales—Statutes—Clerks of Court.*—The clerk of the court acquires supervisory power of the sale of land under power contained in a mortgage or deed of trust from the time of an advanced bid paid into his hands, under the provisions of C. S., 2591, which continues until after the final sale under foreclosure. *Lawrence v. Beck*, 196.

2. *Same.*—The supervisory powers invested in the clerk of the court over sales under mortgage, deed of trust, etc., are not those of general control as exercised by the courts in case of an ordinary judicial sale, but confined by the statute to sales, and resales under the power of sale contained in the instruments and in accordance with the directions of the statute. C. S., 2591. *Ibid.*

3. *Same — Ministerial Duties — Nunc Pro Tunc.*—While under the provisions of C. S., 2591, it is required that the clerk order title to be conveyed to the purchaser at the final resale, *semble*, this order is merely ministerial when the resale has been made in accordance with the statute in other respects, and the omission may be supplied by the clerk making the order *nunc pro tunc*, and the deed accordingly made will convey the title to the purchaser. *Ibid.*

4. *Mortgages—Foreclosure — Sales — Contracts — Agreement of Parties — Clerks of Court—Statutes.*—Where the mortgagor of land is in possession and has placed substantial improvements thereon, and is unable to meet some of the notes he has given to the mortgagee for the balance of the purchase price of the land, he may make a valid and enforceable compromise agreement with the mortgagee that the latter will cancel the outstanding notes, and the former will surrender immediate possession and lose the value of the improvements he has

MORTGAGES—*Continued.*

placed on the land; and where, in pursuance of this agreement, the mortgagor has proceeded to foreclose under the power of sale for the purpose of shutting off the right of redemption by the mortgagor and his successors in title, and thereafter the mortgagee, as final purchaser, has brought his action for possession, and his title is found to be incomplete for the failure of the clerk to order conveyance to him, C. S., 2591, it will not warrant a judgment, ignoring this agreement and permitting the plaintiff to proceed with his foreclosure without prejudice. *Ibid.*

5. *Same—Judgments.—Held*, under the facts established by the verdict in this case, judgment will be entered that the clerk order the conveyance to the purchaser *nunc pro tunc;* that plaintiff surrender for cancellation the remaining purchase money or mortgage notes of the defendant, with interest thereon; that defendant's right of redemption and all interest in the lands in defendant or their successors be forever barred and foreclosed; that plaintiff is entitled to the present possession of the land, and that a writ issue to that end; that plaintiff recover the ascertained rents and profits of the land during defendant's wrongful possession, with costs taxed equally against the parties. *Ibid.*

MORTGAGOR AND MORTGAGEE.

Mortgagor and Mortgagee—Landlord and Tenant—Crops—Liens—Priorities — Deeds and Conveyances — Registration.—The principle upon which the mortgagee by parol agreement may become the landlord and the mortgagor his tenant of the mortgaged land after the mortgagor's default, cannot give the landlord before default a lien for supplies, etc., superior to the lien of a chattel mortgage upon the crops raised, when the mortgagee has received and registered his mortgage while the mortgagor was in possession of the premises and before the default occurred or the parol agreement had been made. *Warrington v. Hardison*, 76.

MOTIONS. See Courts, 7; Criminal Law, 1; Constitutional Law, 12; Evidence, 11, 14, 21, 24; Venue, 6; Appeal and Error, 22, 27, 40, 42, 60; New Trials, 1; Actions, 5; Claim and Delivery, 2.

MOTIVE. See Executors and Administrators, 3; Criminal Law, 25.

MULTIPLICITY OF SUITS. See Courts, 3; Criminal Law, 12.

MUNICIPAL CORPORATIONS. See Pleadings, 1, 8; Constitutional Law, 2, 7; Mandamus, 1; Evidence, 18, 20, 22; Partnerships, 1.

1. *Municipal Corporations—Cities and Towns — Trespass — Eminent Domain—Constitutional Law.*—While the city, under its public duty, is not liable to individuals for injuries resulting from the operation of an incinerator for the public benefit, properly built and operated under its government authority, that amounts to an irregular, intermittent and variable trespass, in the absence of some legislative authority conferring such right of action, it is otherwise when the trespass is constant and continuous and amounts to an appropriation of the plaintiff's property for a public use without compensation. *Dayton v. Asheville*, 12.

MUNICIPAL CORPORATIONS—*Continued.*

2. *Same—Actions—Statute of Limitations—Charter Provisions—Notice—Damages.*—In an action to recover damages against a city caused by the operation by the city of an incinerator near the plaintiff's land, and there is allegation and evidence tending to show damages of a continuous and permanent nature amounting to a taking or appropriation in part of the plaintiff's land for a public use without compensation, upon the defendant's plea of the statute of limitations and the failure to give the notice prerequisite to the right of action, provided in the defendant's charter, and conflicting evidence thereon, the cause of action accrues and the statute begins to run from the time the first substantial injury is sustained, or when the first appreciable damage is done. *Ibid.*

3. *Same—Verdict—New Trials—Appeal and Error.*—Where, in an action to recover damages from a city for the taking of plaintiff's land for a public use without compensation, the city has pleaded the statute of limitation and set up as a defense the failure of the defendant to notify the city under the terms or provisions of its charter, and there is no finding by the jury as to the time the first substantial injury, etc., was sustained by the plaintiff, the cause will be remanded for a new trial, and upon this appeal *it is held* that it is unnecessary to decide whether the three-year or ten-year statute would be applicable to a suit of this kind. C. S., 441 (1), 445. *Ibid.*

4. *Municipal Corporations—Cities and Towns—Actions—Notice—Charter Provisions—Burden of Proof—Pleadings.*—Where there is a provision in a city charter requiring the one injured in person or property to give a certain written notice thereof to the city as a prerequisite to his right of action, the plaintiff in such suit must allege and prove that he has complied with this provision, in the absence of a valid excuse. *Ibid.*

5. *Municipal Corporations—Cities and Towns—Streets—Improvements—Statutes—Constitutional Law—Taxation.*—While local assessments against lands along the streets of a city for paving and improving the streets may be regarded as a species of tax, and the authority therefor is generally referred to the taxing power, they are not levied and collected as a contribution to the maintenance of the general government, but more particularly confer advantages or improvements on the lands assessed, and do not fall within the intent and meaning of the State Constitution, Art. V, sec. 5, of our statutes, C. S., 7768, 7901; and the city, in assessing private owners, must take into consideration any city property that abuts on the street improved. C. S., 2710 (14). *Tarboro v. Forbes*, 59.

6. *Same—Legislative Powers—Rule for Assessment.*—It is a matter for the Legislature to determine, by statute, whether the land abutting on a street improved shall be assessed for such improvement according to frontage, or area, or benefit. *Ibid.*

7. *Same—Municipal Property—Public Parks.*—In the absence of constitutional or statutory provision to the contrary, the public property of a municipality, such as parks, etc., is subject to assessment for local improvements of its streets, and when there is no provision exempting them, a public park of a city is included within the intent and mean-

MUNICIPAL CORPORATIONS—*Continued.*

ing of Laws 1915, ch. 56, providing that lands abutting on a street to be paved or improved should be assessed for such improvements to the extent of the respective frontage of the lots thereon, in a certain proportionate part of the cost, by the "front foot" rule. *Ibid.*

8. *Same—Petitions—Majority of Lineal Feet—Municipal Orders—Nullity.* Under a statute requiring that a majority in number of the owners of lots and frontage of lots on a city street may petition for the paving and improving of the street upon which their lots abut, lodge the petition in the office of the municipal clerk, who shall submit the petition to the governing body, etc., it is necessary to the validity of the order for the improvement made by such governing body that the owners of abutting land shall have the majority of the frontage, as well as be the majority in number; and where the petition has not been signed for the city, and the city frontage is omitted, an order by the governing body to improve the street in conformity with the prayer of the petition is a nullity. *Ibid.*

9. *Same—Conclusiveness of Municipal Orders.*—Where it appears to the court as a fact that a city has not signed the petition for street pavement and improvements submitted to its governing body through the municipal clerk, and that it was necessary for it to do so for the petitioners to own the required frontage on the abutting street to comply with the statute a further provision in the statute that the action of the municipal body, upon the investigation and report of the clerk, shall be final and conclusive, will not conclude the court from vacating the order of the city to improve the street according to the prayer of the petition; for otherwise it would subordinate the law, and the unlawful appropriation of property, to the action of the governing body of a municipality. *Ibid.*

10. *Municipal Corporations—Cities and Towns—Streets—Improvements—Petition—Statutory Requirements.*—The failure of the signature of the owners of a majority of the lineal feet abutting on a street petitioned to be paved or improved, as required by the statute, is a substantial and material departure from the essential requirements of the law under which the improvements are allowable, and will invalidate an assessment accordingly determined upon by the governing board of the municipality ordering the work to be done. *Ibid.*

11. *Municipal Corporations—Cities and Towns—"Roadway"—Streets and Sidewalks—Words and Phrases.*—Where a city ordinance prohibits a railroad company from leaving cinders piled on its street, an allegation that the railroad had left a pile of cinders on the "edge of its roadway," in violation of the ordinance, is sufficient, when pertinent to the inquiry, to be submitted to the jury upon the question whether the railroad company had violated the ordinance in having left the cinders piled upon the "street." *Cherry v. R. R.*, 91.

12. *Municipal Corporations—Cities and Towns—Governmental Agencies—Legislative Control—Taxation.*—Municipal corporations, including incorporated cities and towns to a large extent, are simply agencies of the State, constituted for the convenience of local administrations in certain parts of the State's territory; and in the exercise of ordinary governmental functions they are subjected to almost unlimited legis-

MUNICIPAL CORPORATIONS—*Continued.*

lative control; and where not affected by special constitutional provisions, this position extends to the imposition of taxes raised for ordinary governmental purposes. *Cabe v. Board of Aldermen*, 158.

13. *Same—Bonds—Diversion of Funds—Municipal Buildings—Water System.*—The expenditure of the proceeds of the sale of the bonds of an incorporated town for the purpose of erecting a suitable municipal building for its offices, etc., and the expenditure of money for the extension of its waterworks system, are each for ordinary current expenses, not requiring a vote of the people; and where the act authorizing the issuance of bonds for the erection of the municipal building provides that the holders of the bonds are not required or charged with the duty of seeing to the application of the funds, the diversion of the money on hand derived from the sale of the bonds by the proper municipal authorities to the extension of the waterworks system, under statutory authority, does not contravene any constitutional provision or interfere with any private interest. *Ibid.*

14. *Same—Constitutional Law—Captions to Acts.*—The provisions of our Constitution, Art. V, requiring that every act of the General Assembly levying a tax shall state the special object to which it shall be applied, and it shall be applied to no other purpose, does not extend to taxes levied by counties or incorporated cities or towns for general municipal purposes. *Ibid.*

15. *Same.*—Where a valid issue of bonds under the approval of a majority of the qualified voters of an incorporated town was for the purpose of erecting or providing for its municipal building, with the coöperation of the county commissioners or a county memorial association, and upon the failure of this coöperation it was determined by the proper municipal authorities that the amount be inadequate and its expenditure alone for the purpose wasteful: *Held*, the proper authorities of the town, acting with legislative sanction, may divert the proceeds from the sale of the bonds remaining in the town treasury to the extension or enlargement of its waterworks system. *Ibid.*

16. *Municipal Corporations — Cities and Towns — Police Powers — Public Safety—Corporation Commission—Statutes.*—A city has both inherent and authority by general statute over its streets for the protection of its citizens, which is not taken from it by C. S., 1048, conferring like powers upon the Corporation Commission. *Durham v. R. R.*, 240.

17. *Municipal Corporations—Cities and Towns — Public Safety — Charter Powers.*—A city charter giving a city specific authority to erect gates at a railroad crossing, or to require the railroad company to place a flagman there to warn pedestrians, with provision that such authority shall not be exclusive, does not limit the authority of the city therein, or take from it the inherent and statutory right to require that the railroad company construct an underpass for the protection of the public. *Ibid.*

18. *Municipal Corporations—Cities and Towns—Government Damages.*—Municipal corporations are not civilly liable to individuals for failure to perform, or for negligence in performing, duties which are govern-

MUNICIPAL CORPORATIONS—*Continued.*

mental in their nature, including, generally, such duties as are imposed upon them by law solely for the public benefit. *Sandlin v. Wilmington*, 257.

19. *Same—Trespass — Taking of Property — Due Process — Constitutional Law.*—An action for damages against a municipality for trespass will not lie unless authority therefor is conferred by statute, or the injury to the property thus caused amounts to its appropriation by the city without due compensation. *Ibid.*

20. *Same—Nuisance.*—A municipal corporation is not authorized to maintain a nuisance, and an action will lie against it for damages to property resulting therefrom, regarded and dealt with as an appropriation of the property to the extent of the injury that he has thereby received. *Ibid.*

21. *Municipal Corporations—Cities and Towns—Government—Damages.*—An act of a municipality is governmental in its nature when it is done in the exercise of legislative, discretionary, or judicial powers conferred thereon for the benefit of the public; but when the damages have resulted from the negligence or torts of their officers or agents in the exercise of powers conferred upon the municipality for its private advantage or profit, it is ordinarily liable to the individual therefor; as also for the negligent performance of duties by its officers or agents specifically imposed by private statute, or under the general law. *Ibid.*

22. *Same—Landlord and Tenant—Liens.*—The lessee of lands may maintain an action against a municipal corporation to recover the damage his interest in the leased premises may have received from the defendant's maintaining a private nuisance thereon. *Ibid.*

23. *Municipal Corporations—Cities and Towns—Local Improvements—Petition—Bonds.—Held*, it is sufficient under the facts of this case that a petition signed by the owners of land abutting upon a street sought to be improved be presented to the proper town authorities, at any time before the issuance of the bonds contemplated. *Brown v. Hillsboro*, 369.

24. *Municipal Corporations—Taxation—Bonds—Value of Property—Evidence—Tax Lists.*—Where the value of the property within a town is relevant to the inquiry as to its constitutional authority to issue municipal bonds, such value as last fixed by the constituted authorities is that required by the statute, and that of the preceding year is irrelevant. *Ibid.*

25. *Municipal Corporations—Cities and Towns—Statutes—Implied Authority—"Borrow Money"—Bonds—Notes.*—The borrowing of money by an incorporated city or town for street paving or improvements is for a necessary expense, and does not fall within the provisions of Article VII, section 7, of the State Constitution requiring that in order for the municipality to pledge its faith or lend its credit, the proposition must have the approval of a majority of the qualified voters. *Ibid.*

26. *Municipal Corporations — Cities and Towns — Local Improvements—Remedy of Owner Assessed—Statutes.*—The owner of land abutting on a street the municipality proposes to improve has his remedy in

MUNICIPAL CORPORATIONS—*Continued.*

objecting to the local assessment on his property because of the insufficiency of the petition, C. S., 2714, and he may not enjoin the issuance of bonds for this necessary expense on that ground when he has failed to pursue his statutory remedy. *Ibid.*

27. *Municipal Corporations — Cities and Towns — Local Improvements—Bonds—Necessary Expenses—Apportionment of Funds—Statutes.*— Where a town has issued bonds for general street improvements under legislative authority, and includes the amount required for local improvements by assessment of owners of lands abutting a particular street improved, it may charge off from the proceeds of the sale of the bonds the estimated amount to be realized by the special assessments under the provisions of a recent statute. *Ibid.*

28. *Municipal Corporations—Cities and Towns—Indebtedness—Statutes—Legislative Control.*—Municipalities, in incurring obligations for the improvements of their streets, etc., are largely subject to legislative control, and must observe the legislative requirements under which they act. *Ibid.*

29. *Municipal Corporations—Cities and Towns—Taxation—Property Value—Limitation—Constitutional Law—Instructions.—Held*, under the evidence in this suit to enjoin a town from issuing its bonds for street improvements, necessaries under the provisions of Article VII, section 7, State Constitution, the court properly charged the jury as to the constitutional limitation of 8 per cent upon property valuation, and that the jury should only find the facts in the case under the instructions of law from the judge, and not concern themselves with the discretionary matters left by law to the municipal authorities to determine. *Ibid.*

30. *Municipal Corporations—Cities and Towns—Sidewalks—Streets—"Cost"—Statutes.*—A charter of a city provided in separate sections for the paving of its sidewalks and streets, upon certain conditions, requiring the city to pay for the grading and curbing the sidewalks and the abutting owners to pay the balance of the cost of the sidewalks; and as to the streets, the cost of paving to be charged "according to the proportion laid along the property as in case of sidewalks mentioned in the preceding section, one-third to be paid by the property owner on one side of the street, one-third by the property owner on the other side, and one-third by the city": *Held*, the cost of the "grading and curbing" to be borne by the city was confined to the sidewalks, differing from the provisions of the statute applicable to paving the streets, the latter referring to the ratio of frontage which one abutting owner bears to the street frontage of the others, and not implying that the grading of the streets shall be borne by the city "as in case of sidewalks." *Hendersonville v. Freeze*, 476.

31. *Same—"Paving"—Words and Phrases.*—Where the owners of lots abutting on city streets improved are required to pay their proportionate part of the cost under the front-foot rule for "paving," the word "pave" refers to the ratio of frontage of the abutting owners, and signifies all things necessary to and connected with the construction of a firm, convenient, and suitable surface, and includes necessary preparation, such as engineering and grading, and putting down the selected materials for the completion of the work for the public use. *Ibid.*

MUNICIPAL CORPORATIONS—*Continued.*

32. *Municipal Corporations—Charter—Sales—Public Purposes—Ordinance.* Where a city owns a building used for public purposes and an adjoining lot, it may sell same under the provisions in its charter allowing a sale, either publicly or privately, of public places and buildings under an ordinance passed by a recorded affirmative vote of at least seven of the members elected to the council. *Harris v. Durham*, 572.

MURDER. See Homicide, 3, 6, 7, 8, 9, 10, 11, 12; Evidence, 27.

MUTUAL MISTAKE. See Correction of Instruments, 1.

NAVIGABLE WATERS.

1. *Navigable Waters—Carriers of Freight—Commerce—Boats—Fires—Damages—Owner's Liability—Federal Statutes.*—A gas boat, duly registered at the United States Custom House and licensed to do business as a common carrier on the inland waterways of the State, while engaged in the part transportation of an interstate shipment of goods, comes within the provisions of the Federal statutes relieving the owners from liability for damages caused by fire, unless it is caused by the design or neglect of the owner. *Emory v. Credle*, 2.

2. *Same—Employer and Employee.*—The Federal statutes excluding liability from the owners of vessels for damages by fire to an interstate shipment of goods, when applicable, is held to mean that the owners are not liable for the loss of the goods or injury thereto by fire happening on board, unless from design (an act of willfulness) on their part, or from a negligent breach of some duty incumbent upon them as owners, or in which they have personally participated; and they may not be held for loss and injury by fire due entirely to the negligence of the crew, master or seamen. *Ibid.*

3. *Same—Instructions—Respondeat Superior—Appeal and Error—Reversible Error.*—In an action to recover damages from the owners and the master of a vessel employed in an interstate shipment of goods as a common carrier, duly licensed as such under the Federal statutes, when there is evidence that the loss incurred was due entirely to the negligence of the crew, master or seamen employed on the vessel, an instruction that makes the owner responsible for the sole negligence of such employees under the doctrine of *respondeat superior* is reversible error. *Ibid.*

NECESSARIES. See Schools, 2; Constitutional Law, 6; Municipal Corporations, 27.

NEGLIGENCE. See Demurrer, 2; Employer and Employee, 1, 3, 4, 5; Railroads, 1, 4, 5; Instructions, 6; Telegraphs, 1; Husband and Wife, 7.

1. *Negligence—Contributory Negligence—Contracts—Evidence—Appeal and Error—Railroads.*—Where a building used in connection with the plaintiff's plant has been injured by the negligence of defendant's employees on its train in running a freight car over the bumpers at the end of the track, the damage recoverable is the difference between the market value of the building immediately before and immediately after the injury occurred, and as an element thereof the jury may consider the lessened capacity thereof that the plaintiff could not have avoided in making the necessary repairs: *Held*, under the facts of

NEGLIGENCE—*Continued.*

this case the admission of testimony of a witness of the pecuniary loss of the lessened capacity did not constitute reversible error. *Construction Co. v. R. R.*, 43.

2. *Negligence—Contributory Negligence—Concurring Cause—Contracts.*—Contributory negligence, to bar the plaintiff's right to recover, must consist in some negligent act, or an act of omission or commission inconsistent with his exercise of ordinary care, and which concurring with the negligence of the defendant is the proximate cause of the resultant injury; and a mere breach of contract between the parties that lacks this element of cause and effect is insufficient. *Ibid.*

3. *Same—Evidence—Nonsuit—Trials.*—Defendant railroad company put a spur track on plaintiff's land, to be used in supplying the latter's plant with material for manufacture, under a written agreement that plaintiff would not erect a building nearer than a certain distance from the defendant's track, etc. There was evidence tending to show that the defendant continued to operate on this spur track, and knew or should have known that a certain building was nearer the track than the contract permitted, with further evidence that by the exercise of proper care the defendant's employees could have avoided running a box car across the end of the rails, and injuring the building, for which damages are sought in the action: *Held*, it was for the jury to determine whether the negligence of the plaintiff was such contributory negligence as would bar his recovery, and defendant's motion as of nonsuit was properly overruled. *Ibid.*

4. *Negligence—Invitee—Licensee—Evidence—Questions for Jury—Trials.* Where the injury for which damages are sought in the action was received by the plaintiff in falling through an open trap door in the defendant's store while he was there for the purpose of purchasing merchandise, and the defendant contends it was at night, after business hours, and that the injury occurred in a part of the store set apart from customers; and there is evidence in plaintiff's behalf that the store was then lighted and open for business, and he had gone, under the direction of the clerk, to a cabinet in which the goods he desired were kept, and the injury occurred while he was doing so, it was for the jury to decide, in considering the issue as to the defendant's negligence, whether the plaintiff, under the circumstances, was an invitee or licensee, and defendant's motion as of nonsuit was properly denied. *Leavister v. Piano Co.*, 152.

5. *Same—Instructions—Appeal and Error.*—In an action to recover damages for the negligence of defendant in causing a personal injury, involving the question of whether the plaintiff was an invitee or licensee on that part of the defendant's premises where the injury occurred, an exception to the refusal of the judge to give the defendant's prayer for special instruction on that phase of the case is untenable on appeal, when it appears that the trial judge substantially incorporated the requested prayer in his general charge, and further instructed the jury that the plaintiff must show that, under the circumstances, he exercised due care in order to recover. *Ibid.*

6. *Negligence — Evidence — Nonsuit — Questions for Jury—Trials.*—Upon motion to dismiss upon the evidence as upon a nonsuit, the evidence will be considered in its most favorable light to the plaintiff, and

NEGLIGENCE—*Continued.*

where there is evidence that the plaintiff was injured while unloading wet and slippery poles from a car in the course of his employment for the defendant, under the direction or supervision of the defendant's vice-principal; that a skid for unloading had not been furnished, which was customary, and that sufficient help had not been provided for this work: *Held*, sufficient to take the case to the jury on the issues of defendant's actionable negligence; and the motion was properly refused. *Gentry v. Utilities Co.*, 285.

7. *Negligence—Principal and Agent—Automobiles—Parent and Child.*—The parent is not responsible for the negligence of his minor son in causing injury to another in driving his father's automobile, solely by reason of the relationship, for such liability must rest upon some principle of agency or employment, and no recovery can be had against the parent when it is shown that at the time of the injury the car was being operated by the son for his own convenience, contrary to the parent's orders or without his consent, express or implied. *Robertson v. Aldridge*, 292.

8. *Same—Respondeat Superior.*—Where the father owns an automobile for the pleasure and convenience of his family, a minor son living with him and using the car with the parent's consent, express or implied, at the time of an injury negligently inflicted by him on another, will be regarded as representing the parent in such use, and the parent may be held liable in damages for his son's actionable negligence under the principle of *respondeat superior*. *Ibid.*

9. *Same—Authority Implied.*—Where the father owns an automobile for the use of his family, evidence that it was openly and habitually used by his minor son, for the son's own purposes, is sufficient for the finding by the jury that the son was operating the car by authority of the parent, and to hold the parent liable for an injury caused to another by the son's actionable negligence while driving the car on his own account. *Ibid.*

10. *Same—Evidence—Nonsuit.*—Where there is evidence that the father had permitted the son to drive for his own pleasure an automobile kept by him for family use, and there is also evidence in behalf of the father that he had afterwards forbidden his son to do so, and the son had disobeyed his father and without his knowledge had taken out the car for his own purposes, and had negligently inflicted injury on another while driving it: *Held*, upon a motion to dismiss as of nonsuit, the evidence in favor of the father, the defendant in the action, as to his having forbidden his son to use the car on the occasion complained of, should be disregarded, and the question of the father's liability should be submitted to the jury. *Ibid.*

11. *Negligence—Automobile—Permissible Use—Recklessness—Knowledge—Parent and Child.*—While the driving of an automobile is not regarded as inherently dangerous, the owner, parent or otherwise, cannot avoid liability for the actionable negligence of one to whom he intrusts his car, knowing or having reason to believe he is incompetent, reckless, or irresponsible, to an extent that makes a negligent injury probable, though the doctrine of *respondeat superior* is not presented. *Ibid.*

12. *Same—Evidence—Nonsuit—Questions for Jury—Trials.*—Where there is evidence that the father, knowing that his minor son is reckless and

NEGLIGENCE—*Continued.*

irresponsible, directs him to take out his automobile to be washed, and without the father's knowledge the son goes to ride for his own pleasure, and negligently injures another: *Held*, a question for the jury to determine whether the father in entrusting the son with the car for this limited purpose under such circumstances was himself guilty of a negligent act, the proximate cause of the plaintiff's injury; and a motion to dismiss as of nonsuit is erroneously granted. *Ibid.*

13. *Negligence—Contributory Negligence.*—Contributory negligence that will bar the right of recovery of the plaintiff is such omission of the observance of ordinary care required of him, under the circumstances, as concurring or coöperating with the negligence of the defendant becomes the proximate cause of the injury in suit. *Plyler v. R. R.*, 357.

14. *Same—Evidence—Railroads—Public Crossings.*—Where the contributory negligence of the plaintiff consists in his not listening or looking up and down the track before attempting to cross in his automobile, it is incompetent for him to testify, on this issue, that the failure of the engineer to ring the bell and blow the whistle, evidentiary upon the issue as to defendant's negligence, caused him to enter upon the crossing where the injury followed: the question of proximate cause to be determined by existing conditions and not by hypotheses or contingencies. *Ibid.*

15. *Same—Unlawful Acts—Evidence—Instructions.*—Where the statute of another state, applicable to a negligence case tried in our own courts, provides that where a railroad train collides at a public crossing and injures the person or property of one attempting to cross, and the defendant railroad company's employees have neglected to give the required signals, which contributed to the injury, the corporation shall be held liable in damages unless it is shown that in addition to a mere want of ordinary care the person injured, etc., was at the time of the collision guilty of gross or willful negligence, or was acting in violation of the law, and that such gross or willful negligence or unlawful act contributed to the injury: *Held*, the words "gross or willful negligence" and "unlawful act" are not synonymous but alternative terms; and where there is no evidence of any "unlawful act," it is proper for the trial judge to so instruct the jury, and leave only to their consideration the question of gross or willful negligence of the plaintiff, of which there was evidence. *Ibid.*

16. *Negligence—Evidence—Nonsuit—Employer and Employee—Master and Servant—Railroads—Tramroads—Safe Appliances—Derailments—Statutes.*—In an action to recover for the wrongful death of plaintiff's intestate against a tram road or logging road operated by steam, there was evidence tending to show that the intestate, the engineer of the defendant company, was killed by a derailment of his locomotive, an old and antiquated one, that had gotten away from his control and was rapidly running down grade over a road with many improperly constructed curves; that plaintiff's effort to throw sand upon the track from the sand dome was ineffectual from the failure of the appliance therefor to work; that the cars drawn by the locomotive at the time had only "hand brakes" on them, out of order, etc.: *Held*, upon defendant's motion as of nonsuit, the derailment was in itself evidence

NEGLIGENCE—*Continued.*

of defendant company's actionable negligence, as also the defective appliances and the negligence of the defendant's officers in charge (C. S., 3466, 3467, 3468), these provisions applying to logging roads and tram roads; and the motion was properly denied. *Craig v. Lumber Co.*, 560.

17. *Negligence—Contributory Negligence—Proximate Cause.*—The contributory negligence of the plaintiff in a personal injury case will bar his recovery if it proximately produces the injury for which damages are sought by him in his action. *McLeod v. Lemons*, 610.

NEGOTIABLE INSTRUMENTS. See Bills and Notes, 1, 2, 3, 7, 8, 9, 10, 11; Correction of Instruments, 1.

NEWLY DISCOVERED EVIDENCE. See New Trials, 1; Criminal Law, 15.

NEW TRIALS. See Municipal Corporations, 3; Appeal and Error, 16, 25; Evidence, 3; Issues, 2; Criminal Law, 15, 27.

New Trials—Motions—Newly Discovered Evidence—Burden of Proof.—The applicant for a new trial for newly discovered evidence has the burden of rebutting the presumption that the verdict is correct, and of showing that there has not been a lack of due diligence on his part; and as a prerequisite to the granting of his motion it must appear by affidavit that the witness will give the newly discovered evidence; that it is probably true; that it is competent and relevant; that due diligence has been used by him; that the testimony is not merely cumulative; that it does not tend only to contradict a former witness or to impeach or discredit him; and that on another trial a different result will probably be reached and the right prevail. *Brown v. Hillsboro*, 371.

NONSUIT. See Constitutional Law, 12; Criminal Law, 23; Intoxicating Liquors, 6; Negligence, 3, 6, 10, 12; Corporations, 5; Telegraphs, 1; Evidence, 2, 4, 14, 15, 16, 23, 24, 25, 30; False Arrest, 1; Railroads, 1, 4, 5; Employer and Employee 3, 4, 6.

NOTES. See Municipal Corporations, 25.

NOTICE. See Insurance, 8; Corporation Commission, 14; Courts, 7; Bills and Notes, 1, 5; Municipal Corporations, 2, 4; Deeds and Conveyances, 5; Equity, 2; Trusts, 1; Venue, 6.

NUISANCE. See Municipal Corporations, 20.

NUNC PRO TUNC. See Mortgages, 3.

OBJECTIONS AND EXCEPTIONS. See Appeal and Error, 2, 15, 21, 27, 29, 30, 31, 46, 49, 50, 52, 53, 55, 65; Instructions, 1; Evidence, 11, 34; Issues, 2; Pleadings, 6; Criminal Law, 16; Homicide, 10; Intoxicating Liquors, 9.

OBSTRUCTING JUSTICE.

1. *Obstructing Justice—Criminal Law—Officers—Health—Sanitary Inspectors—Statutes.*—Sanitary inspectors appointed by the State Board of Health, by virtue of the statute, are authorized and empowered to enter upon any premises and into any buildings or institutions for the purposes of inspection as provided by law or by regulations of the

OBSTRUCTING JUSTICE—*Continued.*

State Board of Health, pursuant to law, and one who willfully interferes with or obstructs them in the performance of their duties is guilty of a misdemeanor and subject to a fine of not less than $100 nor more than $1,000, or imprisoned at the discretion of the court. C. S., 7139, 7140. *S. v. Estes*, 752.

2. *Same—Instructions—Directing Verdict—Questions for Jury.*—In an indictment against one who is charged with willfully obstructing a sanitary inspector of the State Board of Health in the discharge of his duties, the trial judge may not direct a verdict, and it is only when uncontradicted evidence, if accepted as true, establishes the defendant's guilt that he may properly instruct the jury to return a verdict of guilty if they find the evidence to be true beyond a reasonable doubt. C. S., 7139, 7140. *Ibid.*

3. *Same—Threats—Intimation.*—Mere words or opprobious language with an expression of an intention to resist are not sufficient to sustain an indictment for willfully interfering with or obstructing an officer of the law in the performance of his duties, C. S., 7140, unless spoken under circumstances which are calculated to deter an officer of ordinary courage and reasonable prudence in the discharge of his duty pertaining to his office, which raises an issue of fact for the jury to determine. *Ibid.*

OBSTRUCTIONS. See Railroads, 7.

OFFICERS. See Obstructing Justice, 1.

OPINIONS. See Appeal and Error, 4; Courts, 5.

ORDERS. See Criminal Law, 3.

ORDINANCES. See Mandamus, 3; Municipal Corporations, 32.

"OWNER." See Deeds and Conveyances, 12; Fires, 1.

ORIGINAL CAUSE. See Actions, 5.

PARENT AND CHILD. See Negligence, 7, 11.

Parent and Child—Domestic Relations—Personal Injury—Actions—Torts—Public Policy.—It is against the policy of the law in the furtherance of domestic peace and happiness, to permit an unemancipated minor child living at the home of her father as a member of his family, to maintain an action against him for his tort, for a personal injury she has received, alleged to have been caused by his negligence in running an automobile in which she was riding at the time, the welfare of the child being looked after by the courts and by statute especially enacted for the purpose in certain instances, but without statute permitting a recovery of this character, as in case of a wife in her action against her husband. *Small v. Morrison*, 577.

PARKS. See Municipal Corporations, 7.

PAROL. See Trusts, 1, 4.

PAROL EVIDENCE. See Statutes of Frauds, 2; Contracts, 1, 3.

PARTIES. See Estates, 10; Contracts, 9; Appeal and Error, 3; Deeds and Conveyances, 1; Actions, 2, 3; Damages, 4; Government, 1; Insurance, 1; Mortgages, 4.

PARTNERSHIP.

Partnership—Municipal Corporations—Cities and Towns—Petition for Local Improvements—Signatures—Scope of Partnership Powers.—A partner, acting within the scope of the partnership, may sign his firm's name to a petition to the town commissioners for local improvements to be made in the street upon which the firm's lands abuts. *Brown v. Hillsboro*, 369.

PAVEMENT. See Municipal Corporations, 31.

PAYMENT. See Evidence, 5.

PENALTIES. See Statutes, 13.

PERPETUITIES. See Wills, 6.

PERSON. See Evidence, 1; Gifts, 1; Indictment, 2.

PERSONAL INJURY. See Railroads, 5; Landlord and Tenant, 1; Parent and Child, 1.

PERSONAL PROPERTY. See Wills, 9.

PETITIONS. See Municipal Corporations, 8, 10, 23; Appeal and Error, 7; Evidence, 20; Partnership, 1; Criminal Law, 1.

PLATS. See Deeds and Conveyances, 9.

PLEADINGS. See Bills and Notes, 10; Appeal and Error, 5; Municipal Corporations, 4; Demurrer, 1, 2, 3, 4; Mandamus, 4; Actions, 4.

1. *Pleadings—Statutes—Allegations—Eminent Domain—Cities and Towns—Municipal Corporations.*—An allegation in the complaint that defendant city was operating an incinerator near his land and dwelling, causing continuing injury to his dwelling and to the health of his family by its fumes, smoke and ashes, settling upon his furniture, etc., and of a permanent or continuous character, is liberally construed under the terms of our statute, C. S., 535, not only as an allegation of trespass, but also of a partial taking or appropriation of plaintiff's property for a public use. *Dayton v. Asheville*, 12.

2. *Pleadings — Amendments — Discretion of Court — Mortgages—Liens—Statutes.*—In an action by the mortgagee to recover the value of a crop, subject to the lien of his chattel mortgage against the defendant, who is alleged to have received it to his own use, it is discretionary with the trial judge to allow the plaintiff to amend his complaint, either before or after verdict, so as to increase the amount of his demand in conformity with the facts he has proved upon the trial. C. S., 547. *Warrington v. Hardison*, 76.

3. *Pleadings—Demurrer—Speaking Demurrer.*—A demurrer to a complaint admits the matters therein alleged to be true, and denies that they are sufficient, thus accepted, to constitute a cause of action; and where a demurrer is dependent upon allegations therein, or attempts to sustain itself, it is bad as a "speaking demurrer." *Latham v. Highway Commission*, 134.

PLEADINGS—*Continued.*

4. *Same—Defenses—Government Agencies—State Highway Commission—Highway Commission.*—A complaint which alleges that the defendant unlawfully entered upon its land, changed the flow of water, or caused it to stand thereon and to sob, soak, and sour the same, rendering it valueless for the purpose of cultivation and producing a crop, or for the uses for which it is adapted, is, in effect, an allegation of an unlawful trespass and the wrongful taking and detention of a part thereof; and where the defendants are a county highway and the State Highway Commission, and desire to avoid liability for the acts committed by them because done in behalf of the State, as its agents and employees, in constructing or maintaining a public highway, under the law, it should not be done by demurrer, but by way of answer, stating the facts. *Ibid.*

5. *Same—Pleading Over—Courts.*—The demurrer of the highway commission to a complaint being bad as not sufficiently setting up their exclusion from liability on the ground of their employment as an agency for the State government in the construction and maintenance of the State's highways, and it also appearing that one in his individual capacity has been made a party defendant, the demurrer is overruled with permission given to the defendant to plead over, and set up their different defenses, as they may be advised. *Ibid.*

6. *Pleadings — Amendments — Peremptory Order for Trial—Appeal and Error—Objections and Exceptions.*—An exception to an order of the Superior Court allowing an amendment to the complaint and setting the case for trial peremptorily on a certain day of a subsequent term, specifying the amendment only, confines the exception to the order allowing the amendment, and no exception being taken to that part of the order setting the case peremptorily for trial, there is nothing in that respect upon which an assignment of error may be based. *Currie v. Malloy*, 206.

7. *Same—Court's Discretion.*—Under the liberal policy of our procedure in allowing amendments to pleadings, it is within the discretionary power of the trial court to permit the plaintiff to amend his complaint by alleging fraud and deceit, when the same is germane to the original inquiry and does not substantially change the cause of action alleged. *Semble*, when the defendant shows to the court that such amendment allowed upon the trial has taken him by surprise, and finds him unprepared, the court may withdraw a juror, order a mistrial, and continue the case. *Ibid.*

8. *Pleadings—Demurrer—Speaking Demurrer—Municipal Corporations—Cities and Towns—Statutes.*—A demurrer only presents for the determination of the court questions of law upon the facts alleged in the former pleading taking them as true; and a demurrer that goes further, and makes allegation of matters in defense not theretofore alleged by the adverse party, is bad as a "speaking demurrer"; and when a city in its demurrer sets forth exemption from liability under a general or special statute, not referred to in the complaint, the provisions of these statutes will be disregarded in passing upon the demurrer. *Sandlin v. Wilmington*, 257.

9. *Pleadings—Interpretation—Statutes.*—The common-law rule that every pleading shall be construed against the pleader has been materially

PLEADINGS—*Continued.*

modified by our statute, C. S., 535, whereunder the allegations of a pleading shall be liberally construed with a view of substantial justice between the parties; and a complaint will not be overthrown by demurrer unless it is wholly insufficient to state a cause of action, or unless it appears that the plaintiff has not shown sufficient ground for relief in law or equity. *Sexton v. Farrington*, 339.

10. *Same—Judgments—Fraud—Trusts.*—The plaintiff brought action to subject certain lands of one of the defendants to the lien of his judgment, alleging that this defendant had mortgaged the *locus in quo* and had furnished the money to the purchaser at the foreclosure sale, who thereupon had conveyed the lands to the codefendants, the wife and stepson of the defendant, the original owner, in fraud of the plaintiff's right: *Held*, sufficient to permit of parol evidence upon the question of the relation of trustees and *cestui que trust* between the defendants, and to subject the equitable interest of the defendant, the beneficial owner, to the payment of the judgment. *Ibid.*

11. *Same—Limitation of Actions.*—A suit to declare one of the defendants in execution the equitable owner of lands for the purchase of which he has furnished the price and his codefendants trustees, is barred by the ten-year statute of limitations. C. S., 445. *Ibid.*

12. *Pleadings—Courts—Discretion.*—The trial judge has the discretionary power conferred on him by statute to allow the defendant to file an answer to the amended complaint during the term, and his action will not be reviewed on appeal when an abuse of this discretion has not been shown. C. S., 536. *Brown v. Hillsboro*, 368.

13. *Pleadings—Demurrer.*—The office of a demurrer is to determine the legal sufficiency of a pleading, and for the purpose admits the truth of the matters and things alleged therein. *Davies v. Blomberg*, 496.

PLEAS. See Evidence, 5; Process, 2.

POLICE. See False Arrest, 3.

POLICE POWER. See Corporation Commission, 3; Constitutional Law, 2; Municipal Corporations, 16; Commerce, 4.

POLICY. See Insurance, 2, 5, 7, 10, 13, 17; Contracts, 10.

POSSESSION. See Trusts, 4; Intoxicating Liquors, 3, 4; Larceny, 1, 2.

POWER. See Roads and Highways, 1; Municipal Corporations, 17; Statutes, 3; Partnership, 1; Abandonment, 3.

PREFERENCES. See Corporations, 3.

PREFERRED STOCK. See Corporations, 1.

PREJUDICE. See False Arrest, 2; Forgery, 3; Trials, 1; Appeal and Error, 51; Criminal Action, 1; Criminal Law, 20, 27.

PREMEDITATION. See Homicide, 7, 9.

PREMISES. See Landlord and Tenant, 1.

PREMIUMS. See Insurance, 3, 10, 11, 17.

PRESUMPTION. See Wills, 2, 7, 10; Appeal and Error, 17, 33; Employer and Employee, 1; Monopolies, 7; Contracts, 8; Criminal Law, 26; Larceny, 1; Verdicts, 5, 6.

PRIMA FACIE CASE. See Vendor and Purchaser, 1; Intoxicating Liquors, 3, 6.

PRINCIPAL AND AGENT. See False Arrest, 3; Judgments, 8; Insurance, 2, 4, 5, 8; Negligence, 7; Government, 4; Contracts, 3; Appeal and Error, 40.

PRINCIPAL AND SURETY. See Claim and Delivery, 2; Judgments, 8; Criminal Law, 21.

PRIORITY. See Mortgagor and Mortgagee, 1.

PRISONER. See Criminal Law, 5.

PRIVITY. See Deeds and Conveyances, 1.

PROBATE. See Husband and Wife, 2.

1. *Probate—Wills—Courts—Orders—Modification.*—Courts having power to admit wills to probate may, in proper instances and on motion and due notice made and given in apt time, set aside the proof of a will in common form had before them, and recall letters of administration or other orders made in such proceedings, or modify them, when it is clearly made to appear that their adjudications or orders have been improvidently granted, or the court has been imposed upon or misled as to essential and true conditions existent in a given case. *In re Meadows*, 99.

2. *Probate — Courts — Clerks of Court—Revocation of Letters—Wills—Widows—Dissent.*—Where the clerk of the court has admitted a will to probate in common form, and the wife of the deceased has petitioned the clerk to set aside her letters of appointment as executrix therein in order that she may dissent from the will, with allegation and proof that she was at that time physically exhausted and consequently mentally incapable of understanding the consequences of her acts, and that she had acted under the direction of others: *Held*, the allegations and evidence, if proven, were sufficient for the clerk to revoke the letters he had issued to her. *Ibid.*

3. *Same—Appeal—Superior Courts.*—Where the allegations of a petition by the widow are sufficient with supporting evidence to set aside letters of administration the clerk had issued to her upon admitting to probate the will of her husband in common form, and she has appealed from an order of the clerk adverse to her, rendered on the ground that she had not sufficiently established her allegations, it is incumbent on the judge to pass upon the controverted facts, and thereon render such judgment as it appears to him that justice and right require. *Ibid.*

4. *Same—Questions for Court—Jury.*—Where the allegations and evidence are sufficient for the clerk of the Superior Court to annul letters of administration he has issued to the wife, in her petition therefor, in proceedings properly prosecuted, the clerk or the judge, on appeal, may empanel a jury to try the facts and aid the court in determining

PROBATE—*Continued.*

them; but the court may disregard the verdict and reach and establish its own conclusions thereon. *Ibid.*

5. *Probate — Courts—Letters of Administration—Revocation—Widows—Arbitration—Dissent—Estoppel.—Held,* under the facts of this case, the widow was not estopped in her proceedings to have the clerk revoke letters of administration he had issued to her as executrix under the will of her deceased husband, by having submitted to arbitration a matter concerning personal property in controversy between her and her granddaughter, both claiming against the will. *Ibid.*

6. *Same—Appeal and Error.*—In these proceedings, upon the petition of the widow to set aside letters testamentary issued to her by the clerk of the court, as executrix under her deceased husband's will, which has been admitted to probate in common form, it appears that they were sufficiently broad to apply to and include the probate of the will, the qualification, and an agreement between the widow and her granddaughter to arbitrate, and the Superior Court judge, on appeal, was in error in failing to determine the facts, and in concluding that the widow was estopped as a matter of law by her agreement to arbitrate. *Ibid.*

PROCESS. See Claim and Delivery, 2; Common Law, 1; Government, 1, 4; Judgments, 1; Summons, 1, 2; Actions, 4; Estates, 11; Executors and Administrators, 3.

1. *Process—Summons—Deceit—Fraud—Irregularities—Waiver.*—The law will not lend its sanction or support to an act, otherwise lawful, which is accomplished by unlawful means, and where the service of summons on defendant has been procured by plaintiff's fraud or deceit, the defendant may specially appear in apt time and show the fact; but his general appearance and plea to the merits of the action will be deemed a waiver of any irregularity in the service of the process. *Electric Co. v. Light Plant,* 534.

2. *Same—Attachment—General Appearance—Pleas—Merits.*—The plaintiff made a partial payment in advance on five automatic lighting machines purchased from the nonresident defendant, had one of them shipped in advance which he upon examination found to be worthless and not as warranted, and to obtain jurisdiction in our State courts, caused the defendant to ship the other four, bill of lading attached to draft, paid the draft, attached the funds in a local bank in his action for damages, etc. Upon defendant's general appearance and the trial of the case upon its merits: *Held,* the defendant had waived his rights to have the court dismiss the action for alleged fraud or deceit in the procurement of service of summons on him. *Ibid.*

PROMISE. See Contracts, 6.

PROOF. See Correction of Instruments, 2; Bankruptcy, 1; Intoxicating Liquors, 4.

PROPERTY. See Municipal Corporations, 7, 19, 24, 29; Actions, 1; Appeal and Error, 11; Claim and Delivery, 1; Evidence, 22.

PROTEST. See State's Land, 1.

PROXIMATE CAUSE. See Demurrer, 2; Instructions, 6; Negligence, 17.

PUBLIC. See Negligence, 14; Sales, 1.

PUBLIC POLICY. See Parent and Child, 1.

PUBLIC SAFETY. See Municipal Corporations, 16, 17.

PUBLIC SERVICE. See Injunction, 2.

PUBLIC USE. See Municipal Corporations, 32.

PUNISHMENTS. See Constitutional Law, 13.

PURCHASER. See Bills and Notes, 2; Trusts, 2, 3.

QUESTIONS AND ANSWERS. See Appeal and Error, 30, 49, 52, 64.

QUESTIONS FOR JURY. See Advancements, 1; Negligence, 4, 6, 12; Employer and Employee, 1; Mandamus, 2; Evidence, 12, 26; Gifts, 2; Insurance, 5; Railroads, 4, 5; Telegraphs, 1; Criminal Law, 23; Obstructing Justice, 2.

QUESTIONS OF LAW. See Gifts, 2; Mandamus, 4; Probate, 4.

RAILROADS. See Negligence, 1, 14; Government, 1, 2, 3, 4; Commerce, 1; Mandamus, 1; Courts, 6; Damages, 2, 4; Employer and Employee, 1, 2; Summons, 1; War, 1; Carriers, 1, 4; Commerce, 2; Corporation Commission, 9, 10, 11, 12, 13, 14; Constitutional Law, 7; Negligence, 16.

1. *Railroads—Negligence—Evidence—Nonsuit—Employer and Employee—Master and Servant.*—Where a railroad company has failed to furnish its employee a truck for the handling of baggage at its station, evidence that such failure had caused the employee to be ruptured by reason of his having to handle the trunks without it, is sufficient upon which to deny the defendant's motion as of nonsuit, and take the case to the jury. *Hines v. R. R.*, 72.

2. *Same — Statutes — Contributory Negligence—Assumption of Risks.*—Where there is evidence that the employee of a railroad company, in intrastate commerce, was ruptured while handling heavy baggage at the station by the unaided use of his personal strength, when the company had promised to furnish him a truck proper for the service, the use of which would have avoided the injury, it is for the jury to determine whether the defendant was negligent in failing to supply the truck, or whether the plaintiff assumed the risk in attempting to lift the trunk under the circumstances, or whether these were the proximate cause of the injury. C. S., 3465. *Ibid.*

3. *Same—Burden of Proof.*—Contributory negligence does not bar the right of an employee of a railroad to recover damages for a personal injury alleged to have been negligently inflicted on him in an intrastate transaction, and where there is evidence of the latter's negligence, the burden is upon the defendant to show the contributory negligence on the plaintiff's part, and the assumption of risks, when relied upon, and a judgment as of nonsuit should be refused. *Ibid.*

4. *Railroads—Negligence—Assumption of Risks—Evidence—Questions for Jury—Nonsuit—Trials.*—Where there is evidence tending to show that in intrastate shipments the plaintiff was injured while handling

RAILROADS—*Continued.*

baggage for defendant railroad, caused by the failure of the defendant to furnish him a truck with which to safely do this work, and that plaintiff had previously called the want of this implement to the defendant's attention, and that it had failed to fulfill its promise in supplying it, the fact that the plaintiff continued to work, relying upon the defendant's promise, does not, as a matter of law, bar his right of recovery, the question being for the jury to determine whether the defendant continued in this employment under circumstances that were obviously dangerous, or he should have known or appreciated the danger in doing so. *Ibid.*

5. *Railroads—Negligence—Evidence—Baggage — Checking — Personal Injury—Excess Weight—Questions for Jury—Nonsuit.*—Where a railroad company has a different system of checking for baggage exceeding 150 pounds in weight, and has negligently failed to furnish its employee with a truck with which to handle trunks safely, and he has been ruptured in handling or lifting a trunk, in intrastate movements, 100 pounds in excess, without indication by the check or otherwise that it was overweight, the failure of the defendant to have properly checked the trunk is some evidence of its negligence that will take the case to the jury upon the issue. *Ibid.*

6. *Railroads—Crossings—Negligence—Contributory Negligence—Look and Listen—Instructions.*—Where there is evidence tending to show that the plaintiff had failed to use ordinary care before attempting to cross the defendant's railroad tracks at a public crossing, where the injury in suit arose, by neglecting to listen or look up and down the track before entering thereon, an instruction of the court does not make his right of recovery to depend upon this fact alone when elsewhere in the charge he has instructed the jury clearly and fully upon the principle of proximate cause, and such circumstances as would have excused him in not observing the care required of him under the circumstances. *Plyler v. R. R.*, 358.

7. *Same—Obstructions.*—The plaintiff's failure to look in both directions upon a railroad track before attempting to cross at a public crossing where he was injured in a collision with the defendant's train, will not be excused by the evidence that his view was obstructed by trees, etc., when it is shown from all of the evidence, that notwithstanding this obstruction he was afforded a clear and timely view of the track after passing the obstruction, and his failure to observe the care required of him under the circumstances was occasioned by his looking back over the way he had come. *Ibid.*

8. *Railroads—Union Stations—Condemnation — Corporation Commission —Orders.*—C. S., 1708, confers upon any railroad company the right to condemn land for the purpose of getting to a union depot required by the order of the Corporation Commission to be built. *Corporation Commission v. R. R.*, 436.

RAPE. See Criminal Law, 18.

RATE. See Corporation Commission, 1, 2, 3, 6, 7, 8.

REASONABLE DOUBT. See Instructions, 13.

REASONABLE TIME. See Executors and Administrators, 2.

REBUTTAL. See Criminal Law, 26.

"RECEIVE." See Intoxicating Liquors, 7.

RECEIVERS. See Equity, 7.

RECORDARI. See Corporation Commission, 12.

RECORDS. See Appeal and Error, 9, 10, 19, 26, 29, 31, 32, 48, 58, 64, 65; Husband and Wife, 2; Evidence, 18; Corporation Commission, 13.

REFERENCE. See Appeal and Error, 5.

REFORMATION. See Correction of Instruments, 1.

REGISTRATION. See Deeds and Conveyances, 5, 7; Equity, 2; Mortgagor and Mortgagee, 1; Trusts, 1.

REINSTATEMENT. See Appeal and Error, 22, 60.

REMAINDERS. See Estates, 2, 4, 6, 13.

REMAND. See Actions, 4.

REMEDIES. See Courts, 4; Damages, 4; Municipal Corporations, 26; Claim and Delivery, 2.

RENTS. See Wills, 6.

REPAIRS. See Landlord and Tenant, 1.

REPEAL. See Constitutional Law, 1; Statutes, 14, 16.

REPLEVIN. See Appeal and Error, 11.

REPRESENTATIONS. See Bills and Notes, 7.

REPUTATION. See Evidence, 28.

REQUESTS. See Instructions, 2, 3, 7, 11; Appeal and Error, 16; Homicide, 10.

RESERVATION OF RIGHTS. See Commerce, 4.

RES IPSA LOQUITUR. See Evidence, 15.

RES JUDICATA. See Appeal and Error, 60.

RESPONDEAT SUPERIOR. See Navigable Waters, 3; Negligence, 8.

RESTRAINT OF TRADE. See Monopolies, 1.

RESTRICTIONS. See Deeds and Conveyances, 9.

RESULTING TRUSTS. See Trusts, 5.

REVIEW. See Criminal Law, 2.

REVOCATION. See Probate, 2, 5; Appeal and Error, 37; Executors and Administrators, 3; Wills, 7, 11; Constitutional Law, 10.

RIGHTS. See Estates, 1; Evidence, 13; Judgments, 4; Trusts, 3, 4; Venue, 4; Executors and Administrators, 1.

ROADS. See Roads and Highways, 1; Criminal Law, 2.

ROADS AND HIGHWAYS. See Highways.

Roads and Highways—County Roads—Change of Route—State Highway Commission—Discretionary Powers—Statutes—Courts.—The statute, Laws 1921, ch. 2, sec. 10, subsec. (b), and sec. 2, give broad discretionary powers to the State Highway Commission in establishing, altering and changing the route of county roads that are or are proposed to be absorbed in the State Highway system of public roads; and where the commission, in pursuance of section 7 of the act, have, as required, posted at the courthouse door of a county a map showing the proposed route, and the county roads to be taken, the limitation of sixty days expressed in the statute is upon the time allowed the county to object; and a subsequent change made by the State Highway Commission in the proposed route prior to the time of building the highway is not reviewable by the court in the absence of an abuse by the commission of the discretionary power conferred on it by the statute. *Road Commission v. Highway Commission*, 56.

"ROADWAY." See Municipal Corporations, 11.

ROUTE. See Roads and Highways, 1.

RULES. See Municipal Corporations, 6.

RULES OF COURT. See Appeal and Error, 9, 22, 41, 59, 62; Intoxicating Liquors, 9.

RULE IN SHELLEY'S CASE. See Wills, 1.

SALES. See Appeal and Error, 11, 33; Deeds and Conveyances, 5; Evidence, 12; Mortgages, 1, 4; Estates, 9, 12; Municipal Corporations, 32.

Sales—Executor and Administrator — Private Sales — Clerks — Appeal—Superior Court—Discretion of Court—Public Sales.—Where the administratrix, the wife of the deceased, has petitioned the clerk of the court for a confirmation of a private sale of a restaurant belonging to the estate, to her two sons at a certain price, and others of the heirs at law object thereto on the ground that the restaurant was worth more than the price proposed, one of them offering more money therefor, and standing able, ready, and willing to pay the advanced price, and contending that it would bring more at a public sale: *Held*, on appeal from the order of the clerk to the Superior Court, the entire matter was before the Superior Court judge, and he was authorized, upon sufficient affidavits or verified pleadings, to make such orders therein as would tend to make the restaurant bring its full value. *In re Brown*, 398.

SANITARY INSPECTION. See Obstructing Justice, 1.

SCHOOLS. See Statutes, 2, 6.

1. *Schools—School Districts — Taxation — Special Tax — Enlargement of Districts—Elections—Majority Vote—Enlargement of Territory—Statutes.*—The uniting of an existing special school tax district with other districts not having such tax is in effect the enlarging of the boundaries of the tax district to take in outlying nontax territory under the provisions of C. S., 5530; and it is only required for the establishment

SCHOOLS—*Continued.*

of the enlarged district and the levying of a special tax therein, that the district to be enlarged and the outlying territory, should each cast a majority vote in favor of the propositions submitted to them, and it is unnecessary that each of the nontax districts included in the enlarged territory should have separately cast a majority vote in favor of the special tax proposed, nor is it material that one of them was separated from the others by the original special tax district so enlarged. The importance of education upon the mental and moral conditions of the people in relation to self-government, commented upon by WALKER, J. *Vann v. Comrs. of Sampson*, 168.

2. *Schools—School Districts—Taxation—Bonds—Elections—Necessary Expenses—Constitutional Law.*—A school district comes within the provisions of our State Constitution, Art. VII, sec. 7, requiring a majority vote of the qualified voters therein for it to "contract any debt, pledge its faith, or loan its credit," etc., except for necessary expenses. *Jones v. Board of Education*, 303.

3. *Same.*—The building and maintenance of schoolhouses by a school district is not for necessary expenses within the meaning of the Constitution, Art. VII, sec. 7. The construction of Art. VIII, sec. 3, State Constitution, requiring that public schools shall be maintained at least six months in every year, is not involved in case. *Ibid.*

SCHOOL DISTRICTS. See Schools, 1, 2; Statutes, 2, 6.

SEAL. See Corporations, 5.

SECURITY. See Bankruptcy, 1.

SEIZURE. See Appeal and Error, 11.

SELF-DEFENSE. See Homicide, 8, 12.

SENTENCE. See Constitutional Law, 10, 13; Criminal Law, 3, 4, 5; Drunkards, 1.

SEPARATION. See Husband and Wife, 1.

SERVICE. See Government, 1; Appeal and Error, 27.

SETTLEMENT. See Executors and Administrators, 1; Appeal and Error, 56.

SHAREHOLDERS. See Appeal and Error, 40.

SHERIFFS. See Actions, 5; Statutes, 13; Constitutional Law, 10; Criminal Law, 16.

SHIPPING. See Government, 2.

SIDEWALKS. See Municipal Corporations, 30.

SIGNATURES. See Partnerships, 1; Deeds and Conveyances, 11.

SOLICITOR. See Insurance, 4.

SPECIAL VENIRE. See Jury, 1.

SPECIFIC PERFORMANCE. See Deeds and Conveyances, 12.

SPIRITUOUS LIQUORS. See Intoxicating Liquors, 1, 2, 3, 4, 5, 6, 7, 8; Criminal Actions, 1, 17; Evidence, 27; Statutes, 14; Verdicts, 2.

STATE HIGHWAY COMMISSION. See Roads and Highways, 1; Highways, 2, 5; Pleadings, 4.

STATES. See Commerce, 4.

STATE'S LAND.

State's Land—Entry—Protest—Statutes—Disclaimer in Part—Judgments—Costs.—The protestants, under the provisions of C. S., 7557, claimed the original entry, C. S., 7554, was not for the State's vacant and unappropriated lands, but that they were the owners of the entire tract. After the evidence had been introduced, the protestant disclaimed ownership of half of the *locus in quo*. There was no reversible error in the judgment in protestant's favor. (*Nelson v. Lineker*, 172 N. C., 279); but *held*, the enterer was entitled to judgment declaring the remainder of the lands covered by the entry to be vacant and unappropriated, and for costs. C. S., 1241. *In re Hurley*, 422.

STATEMENTS. See Appeal and Error, 6; Criminal Law, 6; Evidence, 29.

STATUTES. See Bills and Notes, 1, 5, 9; Corporation Commission, 1, 4, 5, 9, 10, 11, 12, 13; Courts, 5, 7; Estates, 5, 6, 7, 8, 9, 13; Municipal Corporations, 5, 25, 26, 27, 28, 30; Pleadings, 1, 2, 8, 9; Roads and Highways, 1; Deeds and Conveyances, 4; Demurrer, 1; Employer and Employee, 2; Evidence, 10, 22; Highways, 2; Insurance, 4, 13; Mortgages, 1, 4; Mandamus, 2; Monopolies, 1; Railroads, 1; Schools, 1; Trusts, 4; Venue, 1; Vendor and Purchaser, 1; Actions, 3, 5; Executors and Administrators, 1; Husband and Wife, 1, 3, 4; Instructions, 5; Appeal and Error, 34, 38; Constitutional Law, 4, 6, 7; Drainage Districts, 1; Commerce, 2, 4; State's Lands, 1; Summons, 2; Discovery, 1; Judgments, 8; Negligence, 16; Abandonment, 1, 3; Criminal Law, 10, 17, 28, 34; Intoxicating Liquors, 2, 6, 7, 8; Common Law, 1; Indictment, 2; Obstructing Justice, 1; Verdicts, 2.

1. *Statutes—Interpretation—Several Sections.*—A statute should be construed as a whole to give effect to all of the expressions therein used, regarding none of them as surplusage when they can reasonably be given effect, and the fact that the act consists of several sections is immaterial in the application of the rule of construction. *Jones v. Board of Education*, 303.

2. *Same—Schools—School Districts—Taxation—Bonds.*—Where the first section of a statute merely prescribes the means of ascertaining the will of the voters in a school district upon the question of borrowing money or issuing bonds for the erection and maintenance of school buildings within the district, and in other sections are found expressions clearly indicating that the borrowing of money and the issuance of bonds was intended, the intent of the act must be gathered from the expressions found in its various sections, and bonds issued thereunder with the approval of the voters of the district at an election duly held, upon full notice, are valid obligations of the district issuing them accordingly; and, also, *Held*, that a later reënactment of this statute cured its defects, if any therein existed. *Ibid.*

STATUTES—*Continued.*

3. *Same—Implied Powers.* A provision of a statute authorizing a school district to borrow money for public school purposes implies the power incidental to the execution of the proper evidence of indebtedness therefor, such as the giving of the corporate notes or the issuance of its bonds, with the power to levy the taxes necessary to pay the bonds, principal, and interest. *Ibid.*

4. *Same—Constitutional Law—Benefits.* The legislative authority given to a school district to borrow money implies the power to raise money for the public use on the pledge of the public credit for the designated purposes, and it may be exercised to meet either present or anticipated expenses and liabilities for those purposes, and also to issue in return for borrowed money its obligations in any appropriate form, whether bonds, bills, or notes; and *Held*, the statute under construction on this appeal did not limit the sum authorized to be borrowed to that to be raised by the annual tax in any one year. *Ibid.*

5. *Same.*—Where a school district has been established coterminous with the boundary of a county, excepting a city and a district therefrom, and under legislative authority the county commissioners at the request of the county board of education have called an election, under statutory provisions, to pass upon the question of borrowing money and issuing bonds for public school buildings and school maintenance, etc., to be paid out of funds to be derived from special taxes within the school district, and at the election lawfully held a majority of the qualified voters in the school district have approved of the question submitted to them: *Held*, the statute under which the tax is to be levied is not unconstitutional as a taxing of the territory of the county excepted from the school district for the sole benefit of the territory included therein, but only a taxing of that part of the county within the school district to be advantaged, through the agency of the county board of education. *Ibid.*

6. *Statutes—Uncertainty—Schools—School Districts—Taxation—Automatic Decrease in Tax Rates—Appeal and Error.*—Where a statute authorizes a public school district to borrow money and pledge its credit for the erection of schoolhouses and the maintenance of its schools, its validity is not affected for uncertainty by a proviso that the tax rate shall automatically decrease upon the increase of valuation of property within the district; and the contingency not having arisen in this case, *it is held* that a discussion of the appellant's exception is unnecessary at this time. *Ibid.*

7. *Statutes—Curative Statutes—Vested Rights.*—When the Legislature has authority to enact a statute, but it is invalid for irregularities in its passage, the defects may be cured and the act validated by proper legislation when there is no question of impairing vested rights. *Brown v. Hillsboro*, 371.

8. *Statutes—Interpretation—Conflict—Exceptions.*—Statutes upon the same subject-matter should be construed together, so as to harmonize different portions apparently in conflict, and to give to each and every part some significance if this can be done by a fair and reasonable interpretation; and where there is a general intent expressed in the statute and a particular intent incompatible therewith, the particular

STATUTES—*Continued.*

intent is to be considered in the nature of an exception. *Armstrong v. Comrs. of Gaston*, 405.

9. *Same—Health—Hospitals—Tuberculosis.*—C. S., 7075, appearing in ch. 118, authorizing county commissioners to levy a special tax to be expended under the committee composed of the chairman of the board of county commissioners, the county health officer or county physician "for the preservation of public health," should be construed in connection with the sections of the following ch. 119, as to the maintenance of permanent public hospitals, and requires that the question of establishing such hospitals, as in this case for a county tuberculosis hospital, shall have the approval of the voters of the county in accordance to the methods and in the manner specified by the statute. *Ibid.*

10. *Statute—Interpretation—Prospective Effect — Federal Transportation Act.*—The Federal Transportation or the "Esch-Cummings" Act is prospective in its enforcement, and cannot relate back to a final order of the State Corporation Commission not appealed from, for the erection of a union station where the lines of an intrastate and interstate carrier cross each other, the execution of which has been stayed by the commission until after the passage of the Federal statute solely for the advantage of the carriers at their request. *Corporation Commission v. R. R.*, 437.

11. *Statutes—Interpretation—Prospective Effect.*—Retrospective laws are generally regarded as dangerous to liberty and private rights, and such effect will not be given them by the courts unless the Legislature has explicitly declared in proper instances its intention that they should so operate; or unless such intention appears by necessary implication from the nature and words of the act so clearly as to leave no room for a reasonable doubt on the subject. *Ibid.*

12. *Same—Legislative Committee Explanation—Amendments Offered and Rejected.*—In construing the Federal Transportation Act in this case, consideration is given to the explanation of the chairman of the committee in Congress, having the bill in charge, which had its effect in defeating an amendment that it apply to union depots at points that were not termini of the interstate carrier, such consideration being permissible under the opinions in several cases decided in the United States Supreme Court. *Ibid.*

13. *Statutes—Penalties—Methods for Enforcement—Sheriffs—Amercement.* The method by which a sheriff may be amerced for unlawfully failing to execute a warrant it was his duty to serve, as prescribed by C. S., 3936, is alone to be followed in an action for the penalty brought thereunder. *Walker v. Odom*, 557.

14. *Statutes—Repealing Laws—Spirituous Liquors—Intoxicating Liquors.* The recent Turlington Act repeals all conflicting laws and makes the possession of any intoxicating liquors for the purpose of sale unlawful, unless such liquors are for the private use and in the residence of the possessor: *Held*, our prior statute making the possession of one quart thereof prima facie evidence of the purpose of unlawful sale is not in conflict therewith or repealed thereby. *S. v. Foster*, 675.

STATUTES—*Continued.*

15. *Same.* The repealing clause of a statute applying to laws in conflict therewith cannot be construed as impliedly repealing all previous laws on the subject, but only to the extent they are conflicting. *Ibid.*

16. *Statutes—Repeal—Interpretation—Proposed Amendments.* An amendment to a bill passed by one branch of legislation but rejected by the other cannot affect the interpretation of the act. *Ibid.*

STATUTE OF FRAUDS. See Contracts, 3; Deeds and Conveyances, 11.

1. *Statute of Frauds—Fraud—Writing—Contracts.*—To enforce a contract to convey land against the bargainee, who is the party to be charged under the provisions of the statute of frauds (C. S., 988) it is required that the written memorandum or contract shall be so reasonably certain or definite in its terms that the substance and essential elements may be understood from the written agreement itself, unaided by recourse to parol evidence. *Keith v. Bailey*, 262.

2. *Same—Parol Evidence—Evidence.*—The owner of land entered into a contract with plaintiff to convey to him certain lands, sufficient under the statute of frauds, C. S., 988, and plaintiff gave to defendant a paper-writing agreeing to convey the lands, which was silent as to time, terms of payment, etc. The contract to which the plaintiff testified on the trial was partly in parol and did not correspond with the written memorandum, but was inconsistent with its terms: *Held*, that the memorandum not being the contract between the parties, the plaintiff was not entitled to recover. *Ibid.*

STATUTE OF LIMITATIONS. See Municipal Corporations, 2.

STENOGRAPHER'S NOTES. See Appeal and Error, 56.

STIPULATIONS. See Bills and Notes, 6; Insurance, 3, 7.

STOCK. See Summons, 2.

STREETS. See Municipal Corporations, 5, 10, 30.

STREETS AND SIDEWALKS. See Municipal Corporations, 11.

SUBSTANTIVE EVIDENCE. See Homicide, 2.

SUMMONS. See Government, 1, 4; Appeal and Error, 27; Process, 1.

1. *Summons—Process—Appearance—Waiver — Railroads — Director General—Government.*—During the government control of railroads as a war measure, objection for the want of proper service of summons, in an action against one of the railroads, cannot be maintained when the Director General of Railroads has entered a general appearance, amounting to a waiver of insufficient service. *Ashford v. Davis*, 89.

2. *Summons — Process — Attachment — Corporations — Shares of Stock—Courts—Jurisdiction—Statutes.*—Where a nonresident express company doing business in this State, and having property herein, incurred a liability to its shipper for breach of its contract for the transportation and delivery of a shipment, and afterwards became absorbed in another nonresident corporation carrying on the same business with the same property and stock of the selling (debtor)

SUMMONS—*Continued.*

company in the one continuing to do business here is subject to attachment under the provisions of our statute, C. S., 816, 817, 819 *et seq.*, where the cause of action arose here; and the fact that the certificates of stock are not physically in the jurisdiction of the courts of this State is immaterial. *Parks v. Express Co.*, 428.

SUPERIOR COURTS. See Courts, 2, 4; Probate, 3; Sales, 1.

SUPREME COURT. See Appeal and Error, 4, 7, 40.

SURETY. See Bills and Notes, 5; Criminal Law, 21.

SURFACE WATERS. See Waters, 1.

SURPLUSAGE. See Verdicts, 2, 4.

SURVIVORSHIP. See Estates, 1.

SUSPENSION. See Constitutional Law, 10; Criminal Law, 3, 4.

TALESMEN. See Jury, 1.

TARIFFS. See Carriers, 1, 4.

TAXATION. See Municipal Corporations, 5, 12, 24, 29; Highways, 3, 5; Schools, 1, 2; Statutes, 2, 6; Constitutional Law, 5, 6, 7.

TECHNICALITIES. See Common Law, 1.

TELEGRAPHS AND TELEPHONES. See Evidence, 1.

Telegraphs—Telephones—Failure to Deliver Message—Negligence—Evidence—Nonsuit—Questions for Jury—Trials.—In an action against a telegraph company to recover damages for mental anguish for failure to deliver, with reasonable promptness, a telegram announcing the death of the mother of the sender and sendee, stating the time of the funeral, there was evidence tending to show that the defendant's operator accepted the telegram, charges prepaid, to forward it over its own lines and complete the delivery by local long-distance telephone, but that the addressee had no telephone; that the operator at the point of delivery was informed that he was out of town, and without further effort to deliver, telephoned a service message to that effect, which was sent by defendant over its telegraph line to the initial point. This telephone operator testified that she would have made further effort to deliver the telegram had she been informed of its contents. After some delay, the telegram was mailed to the addressee, who received it too late to attend the funeral. There was evidence that had the telegram been mailed in a reasonable time after its receipt at destination, the addressee could and would have attended the funeral: *Held*, the defendant's motion to nonsuit, considering the evidence in the light most favorable to the plaintiff, was properly denied. *Hulin v. Tel. Co.*, 470.

TELEPHONES. See Telegraphs, 1.

TENANTS IN COMMON. See Estates, 3; Judgments, 1; Waters, 3; Deeds and Conveyances, 14.

TERM. See Actions, 3.

TERRITORY. See Schools, 1.

THREATS. See Obstructing Justice, 3.

TIMBER. See Equity, 3.

TIME. See Contracts, 8; Criminal Law, 5; Appeal and Error, 57.

TITLE. See Appeal and Error, 8, 13; Bills and Notes, 2; Deeds and Conveyances, 4, 6, 7, 9, 12, 14; Intervener, 1.

TOLLS. See Corporation Commission, 1.

TORTS. See Damages, 1; Infants, 2; Insurance, 2, 5; Husband and Wife, 5, 6; Parent and Child, 1.

TRADEMARKS.

1. *Trademarks — Trade Names—Devices—Competition—Unfair Competition.*—A manufacturer, dealer, or proprietor of a business may adopt and use a name, symbol, or device to designate and identify his wares or business, and when by his care, diligence, and the qualities of his goods or service he has acquired and established a patronage and good will of substantial value, it will be protected from unfair competition on the part of a rival who adopts for his own business, etc., a sign or symbol in such apparent imitation as will mislead the customers of the former and the public as to the identity of the goods sold or service rendered. *Cab Co. v. Creasman*, 551.

2. *Same—Malicious Purpose.*—Where one has acquired a substantial right by the conduct of his business under a certain device which has become known to his patrons and relied upon by them to identify and use the service or business he has thereunder established, it is not necessary for the protection of his right that his rival has a malicious purpose to injure him in adopting a same or similar device, though unfairness and fraud is the basis of the maintenance of his right, the presumption being that his rival intended to abide by the probable and natural result of his own deliberate act. *Ibid.*

TRADE NAMES. See Trademarks, 1.

TRAMROADS. See Negligence, 16.

TRANSACTIONS. See Vendor and Purchaser, 1.

TRANSPORTATION. See Corporation Commission, 5; Government, 2.

TRESPASS. See Municipal Corporations, 1, 19.

TRIALS. See Pleadings, 6; Railroads, 4; Telegraphs, 1; Criminal Law, 13; Intoxicating Liquors, 6; Larceny, 1; Negligence, 3, 4, 6, 12; Gifts, 2; Advancements, 1; Corporations, 5; Employer and Employee, 1, 3, 4; Evidence, 4, 12, 23, 24, 25; Insurance, 5, 16.

Trials—Prejudice—Courts—Duty of Judge.—It is proper and commendable that the judge presiding at the trial, acting with fairness to both parties, prevent prejudice from entering into the jury box on the trial of an action, and *held*, in this case, it was proper for him to instruct the jury that they must find the facts from the evidence, and not from what the court or counsel may have said. *Brown v. Hillsboro*, 370.

TRUSTEES. See Actions, 2.

TRUSTS. See Monopolies, 1; Equity, 5; Pleadings, 10; Constitutional Law, 7.

1. *Trusts—Parol Trusts—Equity—Deeds and Conveyances—Registration—Notice.*—Certain parol trusts in land are enforceable in this jurisdiction when the holder of the legal title, or those claiming under him, have not acquired it for a fair and reasonable value without notice; and the Connor Act, C. S., 3309, requiring notice by registration as against creditors or purchasers for a valuable consideration from the donor, bargainor, or lessor, necessarily, in contemplation of the express provisions of the statute, refer to such instruments as are in writing and capable of registration. *Spence v. Pottery Co.*, 218.

2. *Same—Purchase for Value.*—When the plaintiff seeks to engraft a parol trust in his favor against the holder of the legal title to lands, only a bona fide purchaser for value without notice is protected, and this under the broad principles of equity, and creditors expressly referred to in the Connor Act, C. S., 3309, are not included. *Ibid.*

3. *Sales—Execution—Judgments—Purchaser—Rights Acquired.*—A judgment creditor or purchaser at an execution sale can acquire no greater lien or interest in the property of the judgment debtor than such debtor had at the time the judgment lien became effective. *Ibid.*

4. *Trusts—Parol Trusts—Possession—Limitation of Actions—Statutes—Husband and Wife—Estates—Entireties—Rights of Creditors—Equity.* When it is established that the wife is entitled to have a deed to lands made to her husband corrected to engraft a parol trust on his legal title in her favor, under the doctrine of entireties, or the right of survivorship, allowable between husband and wife, and both have entered into the possession under the husband's deed, which should be corrected for mistake, etc., and had continued in such possession to the time of the wife's suit, the judgment creditors of the husband can acquire no equitable rights against the enforcement of the parol trust in favor of the wife, the husband having none, though the decree correcting the husband's deed has been entered after the docketing of the judgments, and the suit had been commenced after the claims of the husband's creditors had become valid, and the statute of limitations cannot apply to the enforcement of the wife's equity. *Ibid.*

5. *Trusts and Trustees—Resulting Trusts—Beneficial Interests—Purposes of Trust—Termination of Trust.*—A land corporation conveyed certain of its lots to one who practically owned its stock, expressly to be held by him in trust for the care and support of his lunatic son, giving the trustee full power to convey the land and convert it into other property without accountability to any one, and to appoint a trustee to succeed him by his will, or, in his failure thereof, the court to appoint one: *Held*, the trustee acquired no vested right or interest beneficial to himself in the trust funds, and upon the death of the son in his father's lifetime, the purposes of the trust being then at an end, the title to the lots remaining, or not sold by the trustee, by the operation of law, resulted to the land company, and it may convey a valid title to a purchaser in fee simple. *Land Co. v. Newell*, 410.

TRUSTS AND TRUSTEES. See Trusts.

UNFAIR COMPETITION. See Trademarks, 1.

UNILATERAL CONTRACTS. See Contracts, 4.

UNKNOWN. See Indictment, 2.

USE. See Negligence, 11; Wills, 4.

VALUE. See Corporation Commission, 6; Trusts, 2; Actions, 1; Appeal and Error, 11; Bills and Notes, 2; Claim and Delivery, 1; Evidence, 22; Municipal Corporations, 24, 29; Insurance, 10.

VARIANCE. See Constitutional Law, 11, 30.

VENDOR AND PURCHASER. See Bills and Notes, 2; Infants, 5; Contracts, 3, 5; Fires, 1.

1. *Vendor and Purchaser—Account—Affidavit—Prima Facie Case—Evidence—Witnesses—Deceased Persons—Transactions—Statutes.*—In an action by a corporation against the administratrix of the deceased to recover for goods sold and delivered to the intestate prior to his death, upon an affidavit attached to an account stated under the provisions of C. S., 1789, making such evidence prima facie evidence of the correctness of the account in an action thereon, it is required where objection is raised that the one making the affidavit be qualified as witness to make the statement; and when he has made the affidavit as treasurer of the corporation it must be made to appear upon the face of the affidavit itself, or by evidence *aliunde*, that he was not disqualified for interest under the provisions of C. S., 1795, prohibiting testimony of transactions, etc., with a deceased person. *Lloyd v. Poythress*, 180.

2. *Vendor and Purchaser—Warranty—Breach—Verdict—Appeal and Error—Harmless Error.*—Where an action upon a note given for a Holstein bull has been united with the purchaser's action for damages for breach of warranty in the sale of the bull, and the latter regarded as a counterclaim, the verdict of the jury, upon conflicting evidence and under a charge free from error, that there was no warranty by the plaintiff, renders immaterial defendant's exceptions referring only to the *quantum* of damages for the alleged breach of warranty. *Brady v. Moton*, 421.

VENDOR'S TITLE. See Fires, 2.

VENUE.

1. *Venue—Actions—Statutes.*—The venue of an action brought by a nonresident of the State in a different county herein from that where the defendants reside or do business, and wherein the defendant has no property, is an improper one. C. S., 459. *Roberts v. Moore*, 254.

2. *Same—Courts—Jurisdiction—Waiver.*—The matter of venue is not jurisdictional in the first instance, and the defendant will lose his right to have an action against him removed from an improper to the proper county by failing to comply with the provisions of our statute, C. S., 470, that before the expiration of the time for filing his answer he must demand in writing that the trial be conducted in the proper county. *Ibid.*

3. *Same—Clerks of Court—Appeal.*—The power to entertain a demand of defendant to remove an action to the proper venue under the provi-

VENUE—*Continued.*

sions of C. S., 470, is now conferred by a recent statute upon the clerk, subject to the right of appeal to the judge at the next term, when the motion shall be heard and passed upon *de novo*. *Ibid.*

4. *Same—Substantial Right.*—Where defendant has made his motion before the clerk to remove the action to the proper venue, the question is then a matter of substantial right, and the clerk is without power to proceed further in essentials until the right to remove is considered and passed upon. *Ibid.*

5. *Same—Judgments.*—When the defendant has proceeded by motion before the clerk to have plaintiff's action against him removed to the proper county for improper venue, and this before the time for filing his answer has expired, a judgment by default final for the want of an answer is entered contrary to the due course and practice of the courts, and on appeal to the Supreme Court will be set aside, and the cause remanded for the clerk to consider and pass upon defendant's motion for a change of venue. *Ibid.*

6. *Same—Motions—Notice.*—When a judgment by default final has been entered against a defendant for the want of an answer, and it appears that the defendant had lodged his motion in apt time for a change of venue in accordance with the provisions of C. S., 470, which has not been determined, the failure or inability of the defendant to have given the plaintiff ten days notice of his motion, C. S., 912, before time for answering has expired, will not affect his right to have the judgment by default against him vacated. *Ibid.*

VERDICTS. See Homicide, 6; Intoxicating Liquors, 1; Criminal Law, 18; Indictment, 3; Appeal and Error, 6, 13, 36; Municipal Corporations, 3; Evidence, 3, 11; Bills and Notes, 11; Vendor and Purchaser, 2; Insurance, 16.

1. *Verdict—Issues—Responsiveness—Landlord and Tenant.*—In a landlord's action against his tenant to recover rent for his farm lands, the plaintiff took out claim and delivery for a bale of cotton the defendant had raised on the land, and the defense was a counterclaim for damages for the failure of the plaintiff to furnish sufficient fertilizer, etc., under the terms of the rental agreement, for the making of the crop. Upon the issues the jury failed to answer the one as to plaintiff's damage, and as to recovery on the defendant's counterclaim, "the bale of cotton in controversy": *Held*, the answer was not responsive to the issues or determinative of the rights of the parties, and the plaintiff is entitled to a new trial. *Gulley v. Raynor*, 96.

2. *Verdict — Surplusage — Intoxicating Liquor—Spirituous Liquor—Ambiguity—Statute.*—Where the evidence of possession of whiskey by defendant is prima facie sufficient to show his unlawful purpose of sale, a verdict of "guilty of having too much liquor in his possession for the purpose of sale" is not objectionable as not responsive to the issue; or ambiguous admitting of explanation by reference to the evidence and the charge, the words "too much" being regarded as surplusage. *S. v. Potter*, 742.

3. *Verdicts—Responsiveness—Issues.*—A verdict must be certain and responsive to the issues submitted by the court. *S. v. Snipes*, 743.

VERDICTS—*Continued.*

4. *Same—Courts—Changes—Surplusage.*—While the court may make a merely formal change in the verdict, it cannot amend or change a verdict in any matter of substance without the consent of the jury, or with their consent after the verdict has been finally recorded; but if a verdict is responsive to the issue or issues submitted, and is otherwise sufficient, words which are not a part of the legal verdict may be treated as surplusage. *Ibid.*

5. *Verdicts—Evidence—Presumptions.*—Where an indictment contains several counts and the evidence aplies to one or more, but not to all, a general verdict will be presumed to have been returned on the count or counts to which the evidence relates. *Ibid.*

6. *Verdicts — Indictment — Several Counts—Issues—Answers—Presumptions.*—Where the indictment contains several counts, and there is a verdict of guilty as to some but no verdict as to the others, the failure to return a verdict as to the latter is equivalent to a verdict of not guilty. *Ibid.*

7. *Verdicts — Ambiguity — Interpretation—Evidence—Instructions.*—If a verdict as returned is not complete, but is ambiguous in its terms, the ambiguity may sometimes be explained and the verdict construed by reference to and in connection with the evidence and the charge of the court. *Ibid.*

VESTED INTERESTS. See Estates, 2, 4, 10.

VESTED RIGHTS. See Statutes, 7.

VIOLATION. See Criminal Law, 3, 4.

WAIVER. See Bankruptcy, 1; Process, 1; Appeal and Error, 48, 65.

WAR.

War—Railroads—Connecting Carriers.—Each railroad, under Government control as a war measure, was an integral part of the combined railroads into one system; and where an embargo had been placed in the territory of a connecting carrier, the initial carrier was not required to accept a shipment and transport it to its terminus. *Cotton Mills v. R. R.*, 150 N. C., 614, cited and distinguished. *R. R. v. Lumber Co.*, 228.

WARRANTY. See Vendor and Purchaser, 2.

WATERS.

1. *Waters—Surface Waters—Diversion—Damages.*—The upper proprietor has no right to collect the surface water on his own land and divert it from its natural flow, and discharge it upon the lands of the lower proprietor, to his damage. *Jackson v. Kearns*, 417.

2. *Same—Easements—Judgments—Estoppel.*—A judgment in a former action against the upper proprietor of lands for damages caused to the land and crops of the lower proprietor by the breaking in a freshet of a dam placed by the upper proprietor, without authority, washing holes in the land, does not create a permanent easement in the lands, or estop the lower proprietor in his action to recover damages caused

WATERS—*Continued.*

by the breach in the dam from a later freshet by reason of the continuance of his unlawful act in not having repaired the dam since the former judgment. *Ibid.*

3. *Same—Tenants in Common.*—A recovery by one tenant in common of damages to his undivided interest in the lands caused by the unlawful diversion of water by the upper proprietor on his own lands, does not estop the other tenant in common from recovering the damages he has also sustained by reason of the unlawful act. *Ibid.*

WATER SYSTEM. See Municipal Corporations, 13.

WIDOWS. See Probate, 2, 5.

WILLS. See Appeal and Error, 8; Probate, 1, 2.

1. *Wills—Estates—Defeasible Fee—Deeds and Conveyances—Heirs—Rule in Shelley's Case.*—An estate to W. during his natural life, and after his death to such child or children as he may have or leave lawfully begotten of his body, to be equally divided between them; but if he should not leave any children, then to his nearest heirs: *Held*, the estate acquired by W. is liable to be defeated by his dying and leaving him surviving child or children, and he may not convey an absolute fee-simple title. Whether the ulterior limitation to his nearest heirs would otherwise give him the fee-simple title under the rule in *Shelley's case, quere? White v. Norman*, 1.

2. *Wills—Estates—Inheritance—Death of Devisor—Presumption of Death—Deeds and Conveyances.*—The father devised his lands to his four sons as tenants in common, and one of them conveyed to the other, after his father's death, all of his "right, title, and interest in and to the estate of my late father." One of the sons left home before the death of his father and was not heard of for a period of seven years under circumstances upon which the law would presume his death, and cast the inheritance from him upon his other brothers: *Held*, the presumption of death did not fix the time thereof at any definite time within the seven-year period, and it being necessary for the grantee in the deed to show that his brother predeceased his father, only that part of the land his grantor took under his father's will passed under the deed. *Lewis v. Lewis*, 5.

3. *Wills—Interpretation—Intent.*—The intent of the testator as expressed in the will, when not in violation of law, shall be given effect, and in ascertaining it, the instrument will be considered as a whole, giving to each and every part significance, and harmonizing apparent inconsistencies when it can be done by a reasonable interpretation. *Snow v. Boylston*, 321.

4. *Same—Equal Distribution—Use of Home Place.*—The will of the testatrix estimated the value of her estate at $100,000 after deducting the payment of certain obligations, and after further allowing for certain pecuniary legacies, directed that her estate be divided between her three children, naming them, with further provision that her home place, valued at $40,000 in her estimate of the entire estate, shall be a home for a certain one of her daughters "till such time as a smaller place can be provided and the home place sold for a division": *Held*,

WILLS—*Continued.*

the intent of the testator, as gathered from the language used, was an equal division of her estate, including the proceeds from the sale of the home place, among her children named by her; and an interpretation that the "smaller place" should be provided for the daughter from the estate before division made, would not only violate the pervading purpose of the will, but would require the addition of words not appearing therein, and such would not be a proper charge against the estate. *Ibid.*

5. *Wills—Devise—Intent—Income—Heirs—Estate.*—A will of the mother bequeathing two-thirds of the income from her estate to the youngest of her two sons until he is twenty-one years of age, and until he should reach the age of twenty-five, an equal division of this income between the two sons, and thereafter "it" was to be divided and equally *given* to each, is interpreted as changing the disposition of the whole estate after the youngest son has reached the age of twenty-five, at which time the corpus of the estate and not its income is to be given, or handed over to the two sons in equal parts, and *held*, the provision that in the event "they die . . . leaving heirs, it shall go to the heirs of same," refers to the death of one or both of the sons before the time designated for the final disposition of the estate itself. *Halliburton v. Phifer*, 366.

6. *Wills—Devise—Rents—Perpetuties—Estates—Lands.*—A devise in perpetuity of the rents and profits, or the income of land, passes the land itself in the absence of anything to indicate the testator's contrary intent. *Ibid.*

7. *Wills—Revocation—Presumptions.*—A will may be revoked by a subsequent instrument executed solely for that purpose, or by a subsequent will containing a revoking clause or provisions inconsistent with those of the previous will, or by any other methods prescribed by law; but the mere fact that a second will was made although it purports to be the last, does not necessarily create a presumption that it revokes or is inconsistent with one of a prior date. *In re Wolfe*, 563.

8. *Wills—Interpretation.*—In the construction of wills the primary purpose is to ascertain and give effect to the testator's intention as expressed by the words employed, and if the language is free from ambiguity and doubt, and expresses plainly, clearly, and distinctly the maker's intention, there is no occasion to resort to other means of interpretation. *Ibid.*

9. *Same—"Effects"—Personal Property.*—While the word "effects" used in the disposition of personal property by will may include land when used as referring to antecedent words which describes real estate, or when used in written instruments in which the usual technical terms are not controlling, when used in a general or unlimited sense and unaffected by the context, it signifies all that is embraced in the words "personal property," exclusive of real estate. *Ibid.*

10. *Wills—Intestacy—Presumptions.*—The presumption that a testator intended to dispose of all of his estate will not prevail when it is clearly made to appear that he had not included under the written terms of his will certain of his property of which he had died seized and possessed. *Ibid.*

WILLS—*Continued.*

11. *Same—Revocation.*—A testator devised a certain part of his lands to L., and by a later will gave his effects to his brothers and sisters: *Held*, the two wills were not inconsistent, that the later will did not revoke the former, and that he died intestate as to a part of his lands. *Ibid.*

WITNESSES. See False Arrest, 2; Vendor and Purchaser, 1; Evidence, 17, 29, 32; Criminal Law, 16; Instructions, 9.

Witnesses—Accomplices—Evidence—Instructions.—Where an accomplice in the murder for which the defendants are being tried has given unsupported evidence tending to convict them, a charge of the court is without error to defendants' prejudice that while the jury may convict upon such evidence, it is dangerous and unsafe to do so; but if the testimony of an accomplice, taken with other facts and circumstances in the case, carries conviction to the minds of the jury, and they are satisfied of its truth, and also satisfied beyond a reasonable doubt of the guilt of the defendants, the verdict should be for their conviction. *S. v. Williams*, 645.

WORDS AND PHRASES. See Corporation Commission, 5; Municipal Corporations, 11, 31.

WORK AND LABOR. See Criminal Law, 2.

WRITTEN INSTRUMENTS. See Bills and Notes, 4; Fraud, 2; Statute of Frauds, 1.

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